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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

ROCKY H. CAIN

Petitioner,

v.

TRANSOCEAN OFFSHORE USA, INC. AND SEDCO FOREX CORP.

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are as follows:

1. At what moment does a newly constructed vessel become a vessel in navigation, in other words, when does life begin?

2. Does this Court's decision in *Stewart v. Dutra Construction Company,* 543 U.S. 481 (2005) mandate, as stated by Judge Owen in dissent below, that a newly constructed vessel that is *de facto* in navigation also be *de jure* in navigation for purposes of application of maritime law including the Jones Act?

3. Is the hard and fast rule established by the Fifth Circuit that does not permit a newly constructed vessel to attain the status of vessel in navigation until it complies with all of the contractual requirements of a third party customer go counter to the policy of this Court that discourages the formulation of such absolute rules because of the likelihood of an unjust result unless each case can be considered on the merits of its own facts?

4. Is the restrictive rule established by the Fifth Circuit denying maritime jurisdiction to Jones Act and LWHCA claims by seaman injured on incomplete or newly-completed vessels inconsistent with well-established maritime jurisdiction over a claim of defective design or manufacture of an arguably not-fully completed vessel?

RULE 10 REVIEW ON CERTIORARI

There is a conflict between the decision of the Court of Appeal for the 5th Circuit in this case and the decision of the United States Court of Appeal for the Eleventh Circuit in *Mink v. Genmar Industries, Inc.*, 29 F.3d 1543 (11th Cir. 1994) concerning the issue of when a vessel under construction becomes a vessel in navigation.[1]

The decision of the court below also conflicts with the policy and rationale of this Court's decision in *Stewart v. Dutra Construction Company*, 543 U.S. 481 (2005) that applies the plain meaning of 1 U.S.C. § 3, whereas denying vessel-in-navigation status to the CAJUN EXPRESS on the date of the accident ignores the reality that the CAJUN EXPRESS became a vessel in navigation at least from the time that it left Singapore under its own power, although assisted by an ocean-going tug.

This matter also involves a question of exceptional importance: When does a vessel under construction become a "vessel in navigation" in accordance with the mandate of 1 U.S.C. § 3?

RULE 14.1 STATEMENT

Petitioner (plaintiff-appellee below) is Rocky H. Cain. Respondents (defendant-appellant below) are Transocean Offshore USA, Inc. and Sedco Forex Corp.

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[1] Although not establishing a circuit conflict, please *see Crawford v. Electric Boat Corp.*, 515 F. Supp.2d 282, 289-90 (D. Conn. 2007).

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Rocky H. Cain., respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit rendered in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at *Cain v. Transocean Offshore USA, Inc.*, 518 F.3d 295, 2008 AMC 831 (5th Cir. La. 2008) (App. A, p.1a). The order of the court of appeals denying petitioners' petition for rehearing (App. B, p.19a), entered on April 2, 2008 is unreported. The opinion of the district court is reported at *Cain v. Transocean Offshore Deep Water Drilling, Inc.*, 2005 U.S. Dist. LEXIS 17643, 2007 A.M.C. 992 (W.D. La. 2005) (App. C, p.21a).

JURISDICTION

The judgment of the court of appeals was entered, with one dissent, on February 21, 2008. Petitioner's timely petition for rehearing was denied on April 2, 2008. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Cain filed suit under the Jones Act, alleging that his injuries were the result of Transocean's negligence and the unseaworthiness of the CAJUN EXPRESS. He also alleged that Transocean was negligent in subsequently assigning him to a work hardening program. Transocean considered the

CAJUN EXPRESS to be a vessel both internally and in their initial pleadings in the district court.[1]

Transocean moved for summary judgment, arguing that Cain was not a Jones Act seaman at the time of his injury because the CAJUN EXPRESS was not yet a "vessel in navigation." The district court denied Transocean's motion, concluding that this Court's decision in *Stewart* had overruled Fifth Circuit precedent concerning watercraft under construction. The district court held that the CAJUN EXPRESS was a vessel at the time of Cain's injury because under *Stewart* it was capable of transporting workers and equipment over water. Transocean's petition for leave to appeal the district court's denial of summary judgment was granted.

The opinion of the court below, including the dissent of Judge Owen, reversing the denial of summary judgment was rendered on February 21, 2008 and revised on March 13, 2008. Several claims, including one against a work-hardening facility, were not ruled on. Rehearing and rehearing en banc were denied on April 2, 2008.

FACTS TAKEN FROM THE COURT OF APPEAL DECISION

In 1996, Plaintiff-Appellee-Petitioner, Rocky Cain, began working as a driller on a semi-submersible drilling rig in the Gulf of Mexico for Sonat Offshore USA, Inc., which became part of

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[1] Transocean's answer [Doc-8/R-63, 64, 68] asked for limitation, contended assumption of maritime risks, and referred to the "M/V CAJUN EXPRESS." These were repeated in their supplemental answer [Doc-20/R. 108, 109, 111] and "M/V" was deleted. No defense was raised in the supplemental answer concerning lack of vessel status.

Transocean Offshore USA, Inc. On March 1, 2000, Transocean assigned Cain as a toolpusher to the "Cajun Construction Site" in Singapore. Cain worked in Singapore for approximately six months at the PPL Shipyard, where the M/V CAJUN EXPRESS was under construction. The CAJUN EXPRESS is a fifth-generation semi-submersible mobile offshore drilling rig designed to drill for oil and gas. Cain was expected to continue working on the CAJUN EXPRESS, or a sister rig, after construction was complete. Cain supervised a drill crew of seven men and was responsible for overseeing safety issues and commissioning the drilling equipment.

During the first half of 2000, the CAJUN EXPRESS underwent sea trials to ensure that the power generation and navigation systems worked and that the structure was watertight for transit. With tugboat assistance, the CAJUN EXPRESS was then towed with men and equipment aboard to Grand Isle, Louisiana. During the journey, workers continued to build the rig, and Cain continued to test equipment. Upon arriving in the Gulf of Mexico, the CAJUN EXPRESS was moored in a "floating shipyard" for completion of construction.

Although the rig was capable of self-propulsion, it was not fully capable of operating as a semi-submersible drilling rig. The necessary construction still included installation of vital pipe-handling equipment and "blisters," which are large steel boxes welded to the rig to increase its buoyancy. Daniel Haslam, a Transocean engineer, testified that when it arrived in the Gulf of Mexico the CAJUN EXPRESS could lay pipe only under limited weather conditions. However, as a fifth generation semi-submersible unit, the most state of the art in the

industry, the CAJUN EXPRESS was not designed to operate only under limited conditions. Haslam testified that no drilling contractor would have found the CAJUN EXPRESS fit for the purpose of drilling a deepwater well in the Gulf of Mexico.

On September 10, 2000, Cain was working on board the CAJUN EXPRESS. At that time, the blisters still had not been installed and the drilling systems had not been commissioned. Cain entered a warehouse located on board the rig to retrieve a part for a member of the drill crew, whereupon he struck his head on a low-hanging light fixture and was injured. Cain received physical therapy and continued to work on board the CAJUN EXPRESS. In April or May 2001, the CAJUN EXPRESS was finally completed and began drilling operations in the Gulf of Mexico.

Cain continued to work as a toolpusher on the CAJUN EXPRESS but was subsequently diagnosed with a herniated disc. In September of 2001, he discontinued work to undergo surgery necessitated by the accident.

ADDITIONAL FACTS IN THE RECORD[2]

According to Haslam, "Certain aspects of the vessel were accepted in Singapore," PPL [the shipyard] was not responsible for the commissioning of the BOPs or for the commissioning of the drill equipment. 34/12-20, R-695. "PPL were required to build the rig, install the drilling equipment in its

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[2] The method of record reference is that used by the district court in his opinion (App. C). The deposition of Transocean engineer, Haslam, is RE-1 and that of Cain is RE-2. Other loose material (the daily reports while in the Gulf of Mexico) is referenced by the alphabetical exhibit in the record box.

final working position, after which it became Transocean's rig. They were not responsible for commissioning the drilling equipment." 19/1-4. The warehouse wherein plaintiff was injured was designed by a European design house and was built, outfitted, and installed by PPL and still thusly configured on the day of the accident. 35/11-25. Cain, who is six feet four inches, hit his head on a downward protruding and unpadded light fixture in the five foot one inch high warehouse on September 10, 2000, but did not finally leave the vessel because of his medical condition until September of 2001, after the CAJUN EXPRESS had complied with every commissioning requirement mandated by Marathon Oil Company, the customer.

After the sea trials in Singapore, the obligations of PPL were complete. The commissioning of the drilling equipment was done by Transocean and was not within PPL's scope of work. Haslam, 28/8-14. "Sea trial is where you commission the power generation system, you ensure that the rig is watertight and that it can transit." Haslam, 20/20-22. After the successful completion of its sea trials, the *CAJUN EXPRESS* "was under its own power, but with the assistance of the tow, towboat." Haslam, 1/31/05, 21/16-20, R-689 "[T]he CAJUN EXPRESS. . . had passed what sea trials conducted en route from Singapore. . . ." Lemelle-4-5, Ex.-A. The vessel had Liberian registry papers and interim certificates from other bodies such as the American Bureau of Shipping. Lemelle, pp. 18-19.

While Cain was in Singapore on the CAJUN EXPRESS,[3] he worked on "commissioning" new equipment, which meant "crank up the new equipment and run it through the process that it would be if you were drilling, make sure it was working properly." Cain, 30/17-22. He continued doing this work while in transit from Singapore to Cape Town, Cain, 21/17-21. Cain was employed on the CAJUN EXPRESS continuously from the time he joined her in Singapore until June 20, 2001. Cain, 13/10-13. Transocean concedes that the CAJUN EXPRESS was "in navigation" as of April or May 2001, two months prior to Cain's departure. R-654.

Once the CAJUN EXPRESS arrived in the Gulf, "We parked off of Grand Isle" and stayed there for about six months, Cain, 32/15-24, at which time, she went to a drilling location for three to four months. Cain, 33/12-25. The delay was caused by the use of "very complex equipment." "Equipment like this had never been commissioned before. It was just a learning experience for everybody involved." Haslam, 36/8-15. "The drilling equipment was the last thing to be commissioned. It took about eight months from arriving at Grand Isle until the drilling equipment was fully commissioned." Haslam, 26/1-4. The CAJUN EXPRESS could perform its intended purpose without riser arms "under very limited weather conditions that were not to Marathon's approval." Haslam, 41/13-16. Cain was over the drill crew and made sure work on the drilling activities was conducted safely. Cain, 15/2-17. He reported to

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[3] Construction in Singapore had taken about 18 months. Smith, 4/15/04, 7/17-20.

the senior tool pusher, who was the Offshore Installation Manager. Cain, 13/24-14/3.

On April 17, 2000, Transocean certified to the USCG that Cain had been employed by it "serving on the vessels/rigs listed below. The vessels/rigs were operated as oil vessels/rigs on waters out to 200 miles offshore of locations sited below." "Cajun Cnst, Toolpusher, 01-Mar-2000 to 17-Apr.-2000 35 days." R-603.

The customer, Marathon, had a contract with Transocean "for the supply of a fifth-generation semisubmersible called the CAJUN EXPRESS." Marathon had certain requirements before it would accept the rig, one of which was that the rig be fully commissioned in every aspect, "so we had to commission the drilling equipment." Haslam, 39/21-30/4. In order to meet Marathon's additional requirements, the CAJUN EXPRESS needed blisters, for additional floatation, to be installed because "Marathon had specified a certain variable deck load." *Id.*, 23/23-35, R-694. The "commissioning is the acceptance by the client." *Id.*, 39/21-30/4.

Grand Isle Block 50, where the CAJUN EXPRESS was anchored, was not a shipyard but simply an offshore and open-sea location chosen by Transocean. Its weather vulnerability is demonstrated by the following log entries:

> Eta anchor boat 6:00 NOW 7:30 NO AHV. Re-run #2 and 5 both slipped during heavy squall night before last [attempts were made to reposition rig but anchor slipped too far.][4]
>
> ahv still on location running #3 had to shut

[4] Morning Shipyard Report of September 3, 2000, Ex. C.

> down anchor handling because of weather and sea conditions, right now #7, #5, and #2 holding. Seas come down will rerun # 3. Requesting Delmar to locate stevpress anchors [13 ton burce anchors now in system. [note in squall #2 slipping @ 50 tons.][5]

On September 10, 2000, the date of the accident, the CAJUN EXPRESS was actually running pipe in a pre-existing hole, which they deepened and logged. Cain, 34/12-25, 35/16-36/6.

STATEMENT OF ISSUES PRESENTED

1. When does a newly constructed vessel become a vessel in navigation for purposes of injury claims by seaman and maritime workers, in other words, when does life as a vessel begin?

2. Did the CAJUN EXPRESS become a vessel in navigation once it had passed sea trials, gotten its Liberian registration and ABS Certification, transited to the Gulf under its own power assisted by a tug, and certainly by the week of the accident where it was stationed at a hole and was engaged in test drilling, so that Cain, a Transocean employee in charge of the drilling crew, was serving on a vessel in navigation.

3. As set forth in Judge Owen's dissent, does this Court's decision in *Stewart v. Dutra Construction Company,* 543 U.S. 481 (2005) mandate that a newly constructed vessel that is *de facto* in navigation also be *de jure* in navigation for purposes of application of maritime law including the Jones Act?

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[5] Morning Shipyard Report of September 7, 2000, Ex. C.

4. Is the hard and fast rule established by the Fifth Circuit that does not permit a newly constructed vessel to attain the status of vessel in navigation until it complies with all of the additional contractual requirements of a third party customer, which are asserted to have delayed final completion and vessel-in-navigation status and which therefore cannot be legally relevant go counter to the policy of this Court that discourages the formulation of absolute rules because of the likelihood of unjust results unless each case can be considered on its merits?

5. Is the rule established by the Fifth Circuit denying maritime jurisdiction to Jones Act and LWHCA claims by seaman injured on incomplete or newly-completed vessels inconsistent with well-established maritime jurisdiction for claims of defective design or manufacture of not-fully completed vessels?

6. Should there be a distinction between a vessel whose construction has not been totally completed for Jones Act and LWHCA purposes and for the purposes of maritime jurisdiction for a claim of defective design or manufacture so that there could be no maritime jurisdiction as to the former and no maritime jurisdiction as to the latter?

REASONS FOR GRANTING THE PETITION

The decision of the Fifth Circuit Court of Appeals granting summary judgment denying the claims of injury of a seaman on a vessel that is *de facto* in navigation conflicts with principles established by the Eleventh Circuit *Mink v. Genmar Industries, Inc.*, 29 F.3d 1543 (11th Cir. 1994) and by the

decision of this Court in *Stewart v. Dutra Construction Company,* 543 U.S. 481 (2005). It establishes an absolute policy that admits of no deviation regardless of the facts and is also inconsistent with this Court's decision in *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S. Ct. 2295, 2303 n. 7 and the decision in *Mink v. Genmar Industries, Inc.*, 29 F.3d 1543, 1995 AMC 36 (11th Cir. 1994), which established maritime jurisdiction over product liability claims even for vessels that are arguably not completely constructed.

I.
THE CAJUN EXPRESS WAS A VESSEL IN NAVIGATION

The *CAJUN EXPRESS* became a vessel in navigation for seaman status as to an injury to a permanent member of its drilling crew once it passed its sea trials and was turned over to Transocean, its owner. Since Cain's accident and injury were caused by the defective design and configuration of the warehouse, which had been completed by PPL and not modified, Cain has seaman's rights.

The cases cited in the majority opinion below are distinguishable:

Case	Employer	Stage of Completion	Distinguishing factor
Williams[6]	Shipyard	During sea trial	Accident happened during sea trial to engineering

[6] *Williams v. Avondale Shipyards, Inc.*, 452 F.2d 955, 958 (5th Cir. 1971)

			draftsman
Garret[7]	Owner	Barge only	Needed all building infrastructure
Caruso[8]	Shipbuilder	Before sea trial	Seven months to completion. Plaintiff quartered in hotel
Frankel[9]	Shipbuilder	Finishing engines, etc.	Working for shipbuilder apparently prior to sea trials
Alfred[10]	Shipbuilder	Uncommis-sioned	Shorebased painter
Fredieu[11]	Owner	Needed jackup legs, derrick, etc.	Partially constructed rig transferred to owner for further construction

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[7] *Garret v. Dean Shank Drilling Co.*, 799 F.2d 1007, 1009 (5th Cir. 1986)

[8] *Caruso v. Sterling Yacht & Shipbuilders, Inc.*, 828 F.2d 14, 15-16 (11th Cir. 1987)

[9] *Frankel v. Bethlehem-Fairfield Shipyard*, 132 F.2d 634, 635-36 (4th Cir. 1942).

[10] *Alfred v. MV Margaret Lykes*, 398 F.2d 684, 685 (5th Cir. 1968)

[11] *Fredieu v. Rowan Cos., Inc.*, 738 F.2d 651, 652 (5th Cir. 1984)

Hollister[12]	Construct-or	Under construc-tion	Living quarters and other major components still to be finished
Cain	Owner	Accepted by owner	Finished but not accepted by E & P company which had contracted for vessel

In contradistinction to the other cited cases, the *CAJUN EXPRESS's* completed and accepted warehouse caused injury, subsequent to sea trials and acceptance of the vessel, including acceptance of the warehouse, to the owner's permanent supervisory employee, otherwise a seaman under any test. The vessel travelled to the Gulf of Mexico partially under its own power and then commissioned equipment while undergoing perils of the sea, as mandated by Marathon, who had contracted for the use of the *CAJUN EXPRESS*, There is no evidence that the timing of the Coast Guard inspection and consequent certification could or could not have been advanced. Moreover, the contractual demands of a non-owner, here Marathon, cannot be used to prevent a vessel in commerce from being a vessel in navigation. The *CAJUN EXPRESS* had progressed sufficiently in the continuum of completion that it was a vessel in navigation even assuming the validity of the principles espoused in these cases.

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[12] *Hollister v. Luke Constr. Co.*, 517 F.2d 920, 921 (5th Cir. 1975)

While, on account of the substantial difference between remedies owed to seaman who are exposed to the rigors and perils of the sea and those available to maritime workers who are not, it is understandable that Transocean, like other owners of newly-completed vessels, would want to postpone the day on which such a vessel becomes a "vessel in navigation," it cannot be done by engrafting contractual requirements of a third party, and it is unsupported by the cased cited in the opinion of the majority below.

II.
STEWART'S PRINCIPLES CANNOT BE DISTINGUISHED AWAY

Stewart is one aspect of a stunning sea change[13] whereby maritime law, while losing some of its historical curiosities, is becoming more predictable at the expense of fine distinctions that have generated both uncertainty and litigation.

As stated by District Judge James and by Circuit Judge Owen in dissent, the logic that *Stewart* is applicable as a matter of principle by analogy to an earlier period of a ship's history is as unassailable as its conclusion that the operative vessel definition comes from 1 U.S.C. § 3's unequivocal statement that, "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

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[13] Compare, *Norfolk Southern Railway v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 2004 AMC 2705 (2004).

The insistence of the majority below[14] that attaining vessel status is governed by compliance with every contractual and policy requirement of Marathon, a purchaser of vessel services and not the vessel owner, goes completely against both this Congressional mandate and the intent of this Court in *Stewart* to provide universally-applicable rules, to uphold seaman status for true seamen, to keep shore-based construction workers as non-seamen, and to discourage "snapshot" tests or any other arbitrary rule from getting in the way of the commercial reality of a vessel in navigation. Judge James' decision is cited with approval at 1B-II Benedict on Admiralty § 11b for the proposition that, "One effect of *Stewart* is that some vessels under construction will constitute vessels for purposes of the Jones Act prior to their completion. n29" See also, *Crawford v. Electric Boat Corp.*, 515 F. Supp.2d 282 (D. Conn. 2007) (vessel undergoing "Bravo" or final sea trials was a vessel in navigation as to claims by an engineer employed by the shipyard). See Wood, Loose Lips Launch Ships: *Stewart v. Dutra Construction Company, Inc.*, 37 J. Mar. L. & Com. 113, 142-44 (January, 2006) citing the *Cain* district court decision as proof of his prediction that Justice Thomas' failure to maintain a separate "in navigation" element for the Jones Act status test would mean rough seas ahead for *Williams* and the sea trial cases. See also, Barbier and Garside, Harboring Doubt: How Will the Fifth Circuit Apply *Stewart v. Dutra Construction Co.*? 31 Tul. Mar. L. J. 1, 17-19 (Winter 2006), concluding that as to one of

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[14] "We disagree, however, that *Stewart* was intended to apply to watercraft that are still under construction."

the lines of precedent affected by *Stewart* was that of "A. Sea Trials, Vessels Not Yet in Navigation for Intended Purpose," relying on the reasoning of the *Cain* district court that:

> *Stewart* clearly overrules this line of Fifth Circuit jurisprudence. The "in navigation for its intended purpose" refinement clearly adds a requirement to 1 U.S.C. § 3 that has nothing to do with practical capability.

Judge Barbier concluded that:

> Ships undergoing sea trials represent a special class of nonvessels where the Fifth Circuit previously sought clarity by drawing a bright line. 158 Generally, the ships in these cases were undeniably capable of navigation in the § 3 sense, and only a legal fiction withdrew them from Jones Act vessel status. Parties and the courts should easily be able to resolve future sea trials cases. 159

See also, Nemerofsky, What is a Vessel? A Three Prong Approach, 46 Clev. St. L. Rev. 705 (1998), advocating the same conclusion, stating at n. 11:

> In the case of *Offshore Co. v. Robison*, Judge Wisdom noted, "attempts to fix unvarying meanings . . . to such terms as 'seaman' [and] 'vessel' . . . must come to grief on the facts." 266 F.2d 769, 779 (5th Cir. 1959).

Compare, *Sementilli v. Trinidad Corp.*, 155 F.3d , 1137 (9th Cir. 1998) "This inquiry is not subject to absolute rules, but rather must be made on a case-by-case basis, and in light of considerations of logic, common sense, justice, policy, and precedent." See also, *Cox v. Roth*, 348 U.S. 207, 209-210 (1955) (rejecting the common law rule abating actions on

the death of the tortfeasor as incompatible with the expressed purpose of the Jones Act as welfare legislation).

III.
THE MAJORITY OPINION CONFLICTS WITH DECISIONS OF THE 11TH CIRCUIT

In *Mink v. Genmar Industries, Inc.*, 29 F.3d 1543, 1545, n. 3 (11th Cir. 1994), the plaintiff contended "the *Scarab* was not a 'completed vessel' and thus could not have been "in navigation" for purposes of determining whether a maritime tort occurred, arguing that "the absence of a cockpit cover rendered the vessel incomplete, thus transforming the apparent pleasure ride into some type of sea trial." In rejecting this contention, the court stated:

> No case located suggests that the "completed vessel" analysis is appropriate to the facts of this case. Rather, that theory has been utilized only in determining when the land-based activity of ship building acquires a sufficient "maritime flavor" to fall within the admiralty jurisdiction. In particular, the determination of the status of a vessel has been important to in rem actions where federal jurisdiction is exclusive. Absent applicability of a specific legislative scheme, the general definition of vessel applies. Pursuant to 1 U.S.C. § 3, "'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3. This definition is consonant with the meaning attributed to the term "vessel" by the general maritime law. 1 Benedict on

> Admiralty § 165 at 10-13 (7th ed. revised 1994). **Where a vessel has been used as a means of transportation, as in this case, we decline to engraft upon the general language of the statute a "completed vessel" requirement.**

Likewise, in *Bunge Corp. v. Freeport Marine Repair, Inc.*, 240 F.3d 919, 922-925 (11th Cir(2001), there was a contention that an unfinished vessel was not a vessel for the purposes of the *Louisiana* rule that provides a presumption of fault when a moving ship hits a stationary object. In concluded that unfinished Hull 40 constituted a "vessel" for purposes of admiralty tort jurisdiction, the court rejected the use of definitions other than 1 U.S.C. § 3 and the *Williams* case relied on by the majority as well as another case from the Fifth Circuit, *Rosetti v. Avondale Shipyards, Inc.*, 821 F.2d 1083, 1083 -1085 (5th Cir. 1987), which reached a contrary conclusion in cases such as the present case.

IV.
THE MAJORITY'S DECISION SETS UP AN UNNECESSARY CONFLICT WITH THE RULE PROVIDING MARITIME STATUS TO PRODUCT LIABILITY CASES INVOLVING ARGUABLY INCOMPLETE VESSELS

The refusal of the majority below to apply the *Stewart* rationale in this case improperly perpetuates the contractual rule that a vessel has to be "born" into a negligence context, 1-XII Benedict on Admiralty § 186, whereas it is well established that there is maritime jurisdiction over an alleged defect that occurred on land when the manifestation of it, as here, occurs when the vessel is actually being

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navigated and is located, as here, on the high seas. *Mink v. Genmar Industries, Inc.*, 29 F.3d 1543, 1546 (11th Cir. 1994), citing *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 1986 AMC 2027 (1986) and many other cases.

CONCLUSION

The majority decision below is unsupported by the caselaw cited, attempts to establish a bright-line rule based on a legal fiction despite important contrary facts, refuses to acknowledge the decisive force of this Court's opinion in *Stewart v. Dutra*, conflicts with well-reasoned decisions of the 11th Circuit, and is incompatible with established maritime jurisdiction for product liability tort claims.

The writ should be granted.

Respectfully submitted.

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JUNE 26, 2008

APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT FILED FEBRUARY 21, 2008, AS AMENDED ON MARCH 13, 2008.

ROCKY H CAIN, Plaintiff - Appellee v. TRANSOCEAN OFFSHORE USA, INC; SEDCO FOREX CORP, Defendants - Third Party Plaintiffs - Appellants v. FONTANA CENTER LLC, Third Party Defendant - Appellee

No. 05-30963

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

518 F.3d 295; 2008 U.S. App. LEXIS 3643; 2008 AMC 831

February 21, 2008, Filed

Before KING, GARZA, and OWEN, Circuit Judges. PRISCILLA R. OWEN, CIRCUIT JUDGE, DISSENTING.

[*296]

KING, Circuit Judge:

This case requires us to consider the continued viability of our longstanding precedent holding that a watercraft under construction is not a "vessel in navigation" for purposes of the Jones Act. We hold that the Supreme Court's decision in *Stewart v. Dutra Construction Company*, 543 U.S. 481, 125 S. Ct. 1118, 160 L. Ed. 2d 932 (2005), has not effectively overruled that precedent because the decision did not concern or address the point at which a vessel-to-be actually becomes a vessel. We therefore REVERSE the district court's denial of summary judgment and REMAND for further proceedings.

I. Background

In 1996, Plaintiff-Appellee Rocky Cain began working as a driller [**2] on a semi-submersible

drilling rig in the Gulf of Mexico for Sonat Offshore USA, Inc. Sonat later became part of Defendant-Appellant Transocean Offshore USA, Inc. On March 1, 2000, Transocean assigned Cain as a toolpusher to the "Cajun Construction Site" in Singapore. Cain worked in Singapore for approximately six months at the PPL Shipyard, where the M/V CAJUN EXPRESS was under construction. The CAJUN EXPRESS is a fifth-generation semi-submersible mobile offshore drilling rig designed to drill for oil and gas. Cain was expected to continue working on the CAJUN EXPRESS, or a sister rig, after construction was complete. Cain supervised a drill crew of seven men and was responsible for overseeing safety issues and commissioning the drilling equipment.

[*297] During the first half of 2000, the CAJUN EXPRESS underwent sea trials to ensure that the power generation and navigation systems worked and that the structure was watertight for transit. With tugboat assistance, the CAJUN EXPRESS was then towed with men and equipment aboard to Grand Isle, Louisiana. During the journey, workers continued to build the rig, and Cain continued to test equipment. Upon arriving in the Gulf of Mexico, the CAJUN [**3] EXPRESS was moored in a "floating shipyard" for completion of construction.

Although the rig was capable of self-propulsion, it was not fully capable of operating as a semi-submersible drilling rig. The necessary construction still included installation of vital pipe-handling equipment and "blisters," which are large steel boxes welded to the rig to increase its buoyancy. Daniel Haslam, a Transocean engineer, testified that when it arrived in the Gulf of Mexico the CAJUN EXPRESS could lay pipe only under limited weather

conditions. However, as a fifth generation semi-submersible unit, the most state of the art in the industry, the CAJUN EXPRESS was not designed to operate only under limited conditions. Haslam testified that no drilling contractor would have found the CAJUN EXPRESS fit for the purpose of drilling a deepwater well in the Gulf of Mexico.

On September 10, 2000, Cain was working on board the CAJUN EXPRESS. At that time, the blisters still had not been installed and the drilling systems had not been commissioned. Cain entered a warehouse located on board the rig to retrieve a part for a member of the drill crew, whereupon he struck his head on a low-hanging light fixture [**4] and was injured. A neurosurgeon later examined Cain and recommended that he undergo physical therapy. Cain received physical therapy and continued to work on board the CAJUN EXPRESS. In April or May 2001, the CAJUN EXPRESS was finally completed and began drilling operations in the Gulf of Mexico.

Cain continued to work as a toolpusher on the CAJUN EXPRESS but was subsequently diagnosed with a herniated disc. In September 2001, he discontinued work to undergo a cervical discectomy and fusion. Cain returned to work in December 2001, when Transocean assigned him to a "work hardening" program at the Fontana Center, a facility in Lafayette, Louisiana. While participating in the work hardening program, Cain allegedly experienced elevated blood pressure and suffered additional injuries.

Cain filed suit under the Jones Act, alleging that his injuries were the result of Transocean's negligence and the unseaworthiness of the CAJUN

EXPRESS. He also alleged that Transocean was negligent in assigning him to the work hardening program. Transocean moved for summary judgment, arguing that Cain was not a Jones Act seaman at the time of his injury because the CAJUN EXPRESS was not yet a "vessel [**5] in navigation." The district court denied Transocean's motion, concluding that the Supreme Court's decision in *Stewart* had overruled Fifth Circuit precedent concerning watercraft under construction. The district court held that the CAJUN EXPRESS was a vessel at the time of Cain's injury because under *Stewart* it was capable of transporting workers and equipment over water. This court granted Transocean's petition for leave to appeal the district court's denial of summary judgment. Fontana Center has not submitted a brief and has not raised any arguments on appeal.

II. Discussion

We review the district court's denial of summary judgment de novo. *Solano v.* [*298] *Gulf King 55*, 212 F.3d 902, 905 (5th Cir. 2000). "Summary judgment is proper if the evidence shows the existence of no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Id.*

Transocean argues on appeal that under our established precedent the CAJUN EXPRESS was not a vessel in navigation, and therefore Cain was not a Jones Act seaman, because the rig was still under construction at the time of Cain's injury. It further argues that the Supreme Court's decision in *Stewart* has effected no [**6] change on our prior case law. We agree with both contentions.

A. "Seaman" status and our established precedent

We begin by describing two of the principal remedies available to injured workers who ply their

trade in connection with the sea: the Jones Act and the Longshore Harbor Workers' Compensation Act ("LHWCA"). The two Acts are mutually exclusive compensation regimes. *Becker v. Tidewater, Inc.*, 335 F.3d 376, 386 (5th Cir. 2003). The Jones Act permits a "seaman" to sue his employer for personal injuries suffered as a result of the employer's negligence. *Park v. Stockstill Boat Rentals, Inc.*, 492 F.3d 600, 602-03 (5th Cir. 2007) (citing 46 U.S.C. § 30104(a)). Such an action allows for potentially unlimited damages and is in contrast to the generally prescribed remedial scheme available to maritime workers under the LHWCA. *See Becker*, 335 F.3d at 386-87. Congress did not define the term "seaman," however, and left the courts to decide which maritime employees were covered by the Jones Act. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354, 115 S. Ct. 2172, 132 L. Ed. 2d 314 (1995).

The LHWCA provides the exclusive remedy to land-based workers who fall within its provisions. *Id.* at 355. It specifically excludes from its coverage [**7] "a master or member of a crew of any vessel." 33 U.S.C. § 902(3)(G). The Supreme Court has held this exclusion to be a refinement of the term "seaman" under the Jones Act. *Chandris*, 515 U.S. at 355-56. Thus, a key requirement for Jones Act coverage is actually found in the LHWCA. *Id.*

Under the Jones Act, a "seaman" is a term of art for an employee whose duties "contribut[e] to the function of the vessel or to the accomplishment of its mission" and who has "a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature." *Chandris*, 515 U.S. at 368 (internal quotation marks and citation omitted); *see*

also Garret v. Dean Shank Drilling Co., 799 F.2d 1007, 1009 (5th Cir. 1986) ("The worker is a seaman if he is assigned permanently to a vessel in navigation or performs a substantial part of his work on the vessel, contributing to the function of the vessel or to the accomplishment of its mission."). The existence of a "vessel" is thus crucial to determining seaman status under the Jones Act. *Holmes v. Atlantic Sounding Co. Inc.*, 437 F.3d 441, 446 (5th Cir. 2006).

We have long held that the Jones Act analysis [**8] requires a watercraft to be "in navigation," and we have drawn a distinction between completed crafts and crafts that are under construction. A maritime worker "assisting in the building and ultimate commissioning of a launched but uncompleted vessel floating or maneuvering in navigable waters is not a seaman within the meaning of the Jones Act, because his vessel is not yet an instrumentality of commerce--private or public--and is therefore not 'in navigation.'" *Williams v. Avondale Shipyards, Inc.*, 452 F.2d 955, 958 [*299] (5th Cir. 1971). In *Williams*, we held that a launched ship conducting sea trials was not "in navigation" because it was not yet being used for its intended purpose. *Id.*

Similarly, in *Garret*, we held that an offshore drilling rig was not a vessel in navigation because, at the time of the plaintiff's injury, the structure was still undergoing final construction to make it operational as an oil and gas drilling rig. 799 F.2d at 1009. We noted that the structure had never been engaged as an instrument of commerce and held that a "nonmerchant vessel is in navigation if it is

engaged in its expected duties on navigable waters." *Id.*

In the instant case, the CAJUN EXPRESS was still [**9] under construction at the time of Cain's injury. Although the rig was capable of self-propulsion and had run some test pipe, it lacked vital equipment to make it fully operational as an oil and gas drilling rig. Indeed, as Daniel Haslam testified, no drilling contractor would have found the CAJUN EXPRESS fit to drill a deepwater well in the Gulf of Mexico. The CAJUN EXPRESS was not finally completed and placed into service until April or May 2001, after Cain was injured. Thus, under established Fifth Circuit precedent, the CAJUN EXPRESS was not a vessel in navigation and Cain was not a Jones Act seaman.

B. *Stewart*

We now turn to the Supreme Court's decision in *Stewart v. Dutra Construction Company*. In *Stewart*, the Court addressed whether a dredge known as the SUPER SCOOP was a vessel under the LHWCA. 543 U.S. at 484. Although the case specifically concerned the LHWCA, we have recognized that *Stewart*'s analysis of the term "vessel" applies equally to the LHWCA and to the Jones Act. *Holmes*, 437 F.3d at 448.

The SUPER SCOOP was a floating platform with a clamshell bucket suspended beneath the water used to remove silt from the ocean floor. *Stewart*, 543 U.S. at 484. The dredge was engaged [**10] in digging a trench beneath Boston Harbor as part of the "Big Dig" project. *Id.* It had limited means of self-propulsion and was typically moved by tugboat, but it could move short distances by manipulating its anchors and cables. *Id.*

The First Circuit applied its test for vessel status found in *DiGiovanni v. Traylor Brothers, Inc.*, 959 F.2d 1119, 1123 (1st Cir. 1992) (en banc), which had held that "if a barge . . . or other float's purpose or primary business is *not* navigation or commerce, then workers assigned thereto for its shore enterprise are to be considered seamen only when it is in actual navigation or transit at the time of the plaintiff's injury." *Id.* at 485-86 (internal quotation marks omitted). The First Circuit held that the SUPER SCOOP was not a vessel because any navigation was incidental to the craft's primary function of construction. *Id.* at 486. It also found significant the dredge's stationary position at the time of the plaintiff's injury. *Id.*

The Supreme Court rejected the First Circuit's test for vessel status, concluding that although Congress did not define "vessel" in the LHWCA or the Jones Act, it had already defined "vessel" elsewhere at the time both acts [**11] were passed. *Id.* at 487-88. Specifically, under 1 U.S.C. § 3 (formerly § 3 of the Revised Statutes of 1873), a vessel "includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." Significantly, § 3 codified the meaning that the term "vessel" had acquired in general maritime law, and the Court noted the historic case law prior to the Jones Act [*300] and the LHWCA where courts had often used § 3's definition to conclude that dredges were vessels. *Id.* at 488-90 & n.5. The early case law showed that at the time the Jones Act and LHWCA were passed in the 1920s, a structure's status as a vessel depended on whether the structure was a means of transportation. *Id.* at 491.

Relying on § 3, the Court held that a vessel "is any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment." *Id.* at 497. In other words, the Court rejected the First Circuit's two-pronged test, which had asked whether a craft was used primarily for transportation, and if not whether the craft was motionless or moving at the time of the plaintiff's injury. The Court [**12] looked only to whether the dredge could be used for transportation. Because the SUPER SCOOP was not only capable of transporting men and equipment but had actually done so, the Court found that the dredge was a vessel for purposes of the LHWCA. *Id.* at 495.

With respect to the requirement that a vessel be "in navigation," the Court clarified that the requirement was meant to show only that structures could lose their vessel status if they are withdrawn from the water for extended periods. *Id.* at 496. The "in navigation" requirement does not stand apart from § 3 and "is relevant to whether the craft is 'used, or capable of being used' for maritime transportation." *Id.* But "[t]he question remains in all cases whether the watercraft's use 'as a means of transportation on water' is a practical possibility or merely a theoretical one." *Id.*

C. *Stewart* and vessels-to-be

The district court held that the CAJUN EXPRESS was a vessel under *Stewart* because not only was it capable of transportation but it had also transported workers and equipment from Singapore to the Gulf of Mexico. We disagree, however, that *Stewart* was intended to apply to watercraft that are still under construction. "[W]e cannot [**13] overrule

the decision of a prior panel unless such overruling is *unequivocally* directed by controlling Supreme Court precedent." *United States v. Zuniga-Salinas*, 945 F.2d 1302, 1306 (5th Cir. 1991) (emphasis added). We conclude that our well-settled body of law in this area has not been effectively overruled.

The language in *Stewart* is admittedly broad, and we have recognized that the Court's decision significantly enlarges the types of *unconventional* and *special purpose* watercraft that now must be considered vessels that might not have met the test before *Stewart*. *See Holmes*, 437 F.3d at 448. *Stewart* began, however, by framing the issue before it narrowly: "whether a dredge is a 'vessel' under [the LHWCA]." *Stewart*, 543 U.S. at 484. The Court decided that specific question, concluding that the First Circuit's focus on an existing craft's purpose and movement was inconsistent with the text of § 3 and the established meaning of "vessel" in general maritime law. We thus read *Stewart*'s instruction that a craft is a vessel if it is *capable* of marine transportation in the context of that case to negate the First Circuit's test for an established structure.

Stewart examined an already-completed [**14] structure in use for its intended purpose. *Stewart* did not concern what to do with ships and other structures under construction, and so the Court did not address whether § 3's definition of vessel applies to incomplete structures that may be in a dry dock or a floating shipyard. In other words, *Stewart* did not consider whether [*301] an incomplete structure that "is not yet an instrumentality of commerce," *Williams*, 452 F.2d at 953, is a vessel in navigation. Rather, *Stewart* stressed that the "in navigation" requirement had nothing to do with locomotion and

instead meant that "structures may lose their character as vessels if they have been withdrawn from the water for extended periods of time." *Stewart*, 543 U.S. at 496. But for a structure to be able to lose its vessel status by being taken out of navigation, it must be equally true that a structure may not attain vessel status before it is ever put into "navigation."

Other courts have similarly concluded that an incomplete structure that has not been put into navigation as an instrument of commerce is not a vessel. *See Caruso v. Sterling Yacht & Shipbuilders, Inc.*, 828 F.2d 14, 15-16 (11th Cir. 1987); *Frankel v. Bethlehem-Fairfield Shipyard*, 132 F.2d 634, 635-36 (4th Cir. 1942). [**15] Moreover, courts have historically spoken of navigation in tandem with commerce. *See, e.g., The Robert W. Parsons*, 191 U.S. 17, 31, 24 S. Ct. 8, 48 L. Ed. 73 (1903) (holding that barge drawn by horses in the Erie Canal was a vessel because "[s]o long as the vessel is engaged in commerce and navigation it is difficult to see how the jurisdiction of admiralty is affected by its means of propulsion"); *Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625, 627-28, 7 S. Ct. 336, 30 L. Ed. 501 (1887) (noting that "[a] ship or vessel, used for navigation and commerce, though lying at a wharf, and temporarily made fast thereto, as well as her furniture and cargo, are maritime subjects"); *People's Ferry Co. of Boston v. Beers*, 61 U.S. 393, 401, 15 L. Ed. 961 (1857) ("[T]he admiralty courts now exercise jurisdiction over rivers and inland waters, wherever navigation is or may be carried on, and extends to almost every description of vessel which may be employed in transporting our products to market. . . . The admiralty jurisdiction, in cases of contract, depends

primarily upon the nature of the contract, and is limited to contracts, claims, and services, purely maritime, and touching rights and duties appertaining to commerce and navigation.").

That is not to say that only [**16] commercial structures may become vessels and implicate admiralty jurisdiction. *See, e.g., Sisson v. Ruby*, 497 U.S. 358, 363-67, 110 S. Ct. 2892, 111 L. Ed. 2d 292 (1990) (admiralty jurisdiction in tort requires *inter alia* that an incident have a potentially disruptive effect on maritime commerce and be substantially related to maritime activity, such as navigation, but the tortfeasor's activity may be commercial or noncommercial). Rather, our precedent is not inconsistent with the historical perspective that vessels under construction are treated differently from completed vessels. *See The Francis McDonald*, 254 U.S. 242, 243-44, 41 S. Ct. 65, 65 L. Ed. 245 (1920) (holding in contract case that shipbuilding has been considered a nonmaritime activity, whether or not the incomplete ship has been launched). We have previously noted "the historical tradition that vessels under construction give rise to neither a maritime contract nor a maritime tort." *Williams*, 452 F.2d at 958 n.5; *see also Alfred v. MV Margaret Lykes*, 398 F.2d 684, 685 (5th Cir. 1968) (holding that an employee may not maintain a tort action against his employer for an injury sustained on a vessel that has been launched but not fully completed or commissioned). We do not read *Stewart* [**17] to change this body of law, so that a structure under construction remains a non-vessel until it is complete and ready for duty upon the sea.

We further think the preclusion from vessel status of crafts still under construction serves

several important goals and is consistent with the concern for avoiding uncertainties and possible oscillation in [*302] and out of Jones Act status. *See Stewart*, 543 U.S. at 495 (asking whether a watercraft is motionless or moving is the kind of "snapshot" test previously rejected and would impermissibly allow structures to oscillate back and forth between Jones Act coverage).

Our cases show that shipbuilders frequently begin the construction process in a shipyard at one location and then transport the partially completed craft to another location to finish the construction process. *See, e.g., Garret*, 799 F.2d at 1008 (barge hull transported by tug from shipyard in Houma, Louisiana, to Harvey, Louisiana, for completion of superstructure); *Fredieu v. Rowan Cos., Inc.*, 738 F.2d 651, 652 (5th Cir. 1984) (ship partially constructed in Vicksburg, Mississippi, towed to Belle Chasse, Louisiana); *Hollister v. Luke Constr. Co.*, 517 F.2d 920, 921 (5th Cir. 1975) (barge [**18] towed from Harvey, Louisiana, to Houma, Louisiana to complete drilling rig). Along the way, hundreds of employees work to complete these partially-built structures. The CAJUN EXPRESS had over 200 men working on its completion. *Stewart*'s application to these vessels-to-be could have the consequence of creating vessels out of partial structures and transforming many land-based ship construction workers into Jones Act seaman, at least while they work in the service of the ship. At a minimum, it would unnecessarily expand the labyrinth that has developed in the case law concerning seaman status by requiring fact-intensive inquiries in the district courts into the relationship between such workers and the intended vessel. *Cf. Chandris*, 515 U.S. at

356 ("We have made a labyrinth and got lost in it." (internal quotation marks and citation omitted)). Marine employers (and their insurers) and employees, however, have an interest "in being able to predict who will be covered by the Jones Act . . . before a particular workday begins." *Id.* at 363.

That interest is hindered with respect to the construction of watercraft because there will be many points along the continuum of a ship's construction [**19] at which one could rationally argue it is "practically capable" of transportation and therefore a vessel. For example, a structure might become a vessel when it is merely capable of flotation but is still in dry dock; when it can be merely towed or pushed; when the navigation or propulsion systems are installed; when it has been inspected and commissioned; when it has been accepted for delivery; when a crew has been assigned; or when it is actually put to use. Our prior cases settle this uncertainty by asking whether the craft is complete. We continue to believe that "[f]or there to be a seaman, there must first be a ship," but "an incompleted vessel not yet delivered by the builder is not such a ship." *Williams*, 452 F.2d at 958.

The difficulty of applying *Stewart* to vessels under construction may be seen with respect to the CAJUN EXPRESS. The testimony showed that the rig lacked vital equipment for its operations and that no drilling contractor would have found the CAJUN EXPRESS acceptable for duty in the Gulf of Mexico. It strains reason to say that a craft upon the water that is under construction and is not fit for service is practically capable of transportation.

Moreover, mobile [**20] offshore drilling units like the CAJUN EXPRESS are subject to extensive

Coast Guard regulations. *See* 46 C.F.R. §§ 107-09. Before operations begin the unit must receive an Original Certificate of Inspection certifying that it complies with all Coast Guard requirements, including regulations governing lifesaving and firefighting equipment. *Id.* §§ 107.211, [*303] 107.231. The record here shows that the Coast Guard performed an initial walk through of the CAJUN EXPRESS on August 31, 2000, as the first step in the process of certification, but the rig was not put into service until April or May 2001. That the structure was not yet certified as operational and in compliance with all safety requirements casts doubt as to the practicality of its use as a means of transportation. To follow the district court's decision here also runs the risk of concluding that a vessel that may not be legally permitted to operate is nevertheless practically, rather than theoretically, capable of transportation.[1]

In short, although *Stewart* instructs that the "in navigation" requirement "is relevant to whether the craft is 'used, or capable of being used' for maritime transportation," 543 U.S. at 496, that instruction does not consider in the first instance when a vessel-to-be *becomes* a vessel. We view that issue as a separate question from whether an unconventional watercraft *is* a vessel. We therefore hold that *Stewart* does not require us to modify our precedent

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[1] We do *not* hold that a watercraft that has not been certified by the Coast Guard can *never* be considered a vessel. *See Holmes*, 437 F.3d at 443-44 (holding that a barge containing a floating dormitory that [**21] had not been inspected by or registered with the Coast Guard was a vessel). We note only that the absence of certification when legally required should inform the evaluation of a structure's capability for transportation.

regarding the vessel status of incomplete watercraft. As such, the CAJUN EXPRESS was not a "vessel in navigation," and Cain was not a Jones Act seaman. Cain was thus not entitled to relief under the Jones Act for his September 10, 2000 injury.[2]

III. Conclusion

The district court's denial of Transocean's motion for summary judgment is REVERSED and the case is REMANDED to the district court for further proceedings consistent with this opinion. Costs shall be borne by Cain.

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[2] We note that in the district court Cain argued that even if the CAJUN EXPRESS was not a vessel he was a Jones Act seaman based on his overall employment because he was a seaman before joining the CAJUN EXPRESS and his essential duties never changed. The district court did not [**22] reach this issue because it concluded that the CAJUN EXPRESS was a vessel. The parties have not briefed the issue to us, and we express no opinion on its merit. We merely note its existence and point out that it remains unresolved in the district court. Further, Cain's claims with respect to his alleged injuries at the Fontana Center are unresolved.

PRISCILLA R. OWEN, CIRCUIT JUDGE, DISSENTING:

This is a very difficult case, in my view. The panel's opinion sets forth cogent arguments as to why there should be a bright-line rule as to when a vessel under construction becomes a "vessel in navigation" for purposes of determining whether an injured worker was a "seaman" within the meaning of the Jones Act. However, the language used by the United States Supreme Court in *Stewart v. Dutra Construction Company*[1] is broad and seems to require us to conclude that the CAJUN EXPRESS is a contrivance that is capable of being used as a means of transportation [**23] on water since the CAJUN EXPRESS did in fact transport Cain and others across an ocean.

There are undoubtedly conceptual difficulties in applying the principle that a "contrivance" becomes a vessel in navigation when it is a "watercraft practically capable of maritime transportation, regardless of its primary purpose or state of [*304] transit at a particular moment." [2] At some point prior to its actual commissioning, a "contrivance" under construction may become capable of maritime transportation in a physical and practical sense whether moored in the water or in dry dock. The uncertainties as to the hour or day the practical capability of maritime transportation occurs would seem a fertile source of contract and tort litigation and may lead to overlapping insurance arrangements, and unnecessary costs in obtaining that coverage. Additionally, a contrivance under

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[1] 543 U.S. 481, 125 S. Ct. 1118, 160 L. Ed.2d 932 (2005).

[2] Id. at 497.

construction may be moored for long periods of time while further construction continues after an initial voyage transported crew members on the seas, as was the case here.

In spite of the certainty and predictability that the panel's decision would bring in many if not most scenarios involving vessels [**24] under construction, the CAJUN EXPRESS appears to have all the attributes that the Supreme Court ascribed to a "vessel" in *Stewart*. I therefore, very respectfully, dissent.

APPENDIX B – ORDER OF THE COURT OF APPEAL FOR THE FIFTH DISTRICT OF APRIL 2, 2008, DENYING PETITIONERS' PETITION FOR REHEARING (UNREPORTED)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 05-30963
ROCKY H. CAIN Plaintiff – Appellee v.
TRANSOCEAN OFFSHORE USA INC; SODECO FOREX CORP Defendant – Third Party Plaintiffs – Appellants v. FONTANA CENTER LLC Third Party Defendant - Appellee
Appeal from the United States District Court for the Western District of Louisiana, Monroe
ON PETITION FOR REHEARING AND REHEARING EN BANC(Opinion 2/21/08, 5 Cir.,F.3d)
Before KING, GARZA, and OWEN, Circuit Judges.
PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5" CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5" CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and

not disqualified not having voted in favor, Rehearing En Banc is DENIED.
ENTERED FOR THE COURT:

United States Circuit Judge
REHG -4A

APPENDIX C – OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA DECIDED AUGUST 12, 2005.

ROCKY H. CAIN VERSUS TRANSOCEAN OFFSHORE DEEP WATER DRILLING, INC., ET AL.
CIVIL ACTION NO. 03-1372
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, MONROE DIVISION
2005 U.S. Dist. LEXIS 17643; 2007 AMC 992
August 12, 2005, Decided
August 12, 2005, Filed
Before MAG. JUDGE KAREN L. HAYES. ROBERT G. JAMES, UNITED STATES DISTRICT JUDGE.
OPINION BY: Robert G. JAMES

This case arises from Plaintiff Rocky H. Cain's ("Cain") injury aboard a rig in the Gulf of Mexico. Plaintiff brought suit against his employer, Transocean Offshore USA Inc., and its predecessor, Sedco Forex Corporation (collectively "Transocean"), under the Jones Act, 46 U.S.C. § 688, and general maritime law.

On March 16, 2005, twenty days before trial, Transocean filed a Motion for Leave to File Motion for Summary Judgment and for [*2] Expedited Hearing. As the basis for that motion, Transcocean relied on a March 11, 2005 ruling by United States District Judge Ivan Lemelle of the Eastern District of Louisiana in a maritime case involving the same rig at issue in this case.

After reviewing the motion and the opposition memorandum filed by Cain, this Court found good

cause to continue the trial and order mediation, to be completed by the end of April 2005. The parties notified the Court in May 2005 that mediation was unsuccessful. Accordingly, on May 6, 2005, the Court issued a minute entry instructing the parties to brief certain issues by May 31, 2005. The Court also re-set the bench trial in this matter for August 16, 2005.

Briefing is complete, and the Court is now ready to rule. For the following reasons, Transocean's Motion for Summary Judgment [Doc. No. 75] is DENIED.

I. FACTS AND BACKGROUND

In June 1996, Cain was hired as a driller by Sonat Offshore USA Inc., which later became part of Transocean. He was assigned to the rig *Amirante.* Although his job assignment later changed to toolpusher, he continued to work aboard the *Amirante* until March 1, 2000.

On March 1, 2000, Cain was assigned [*3] to work as a toolpusher at the "Cajun Construction Site" in Singapore for construction of the *Cajun Express.* Cain was part of the drilling crew, which had begun to arrive at the construction site in the first half of 1999. *See* Doc. # 75, Exhibit A, Deposition of Daniel Haslam, at 12 (hereinafter "Exh. A, at ___"). It was contemplated that drilling crew members, such as Cain, would stay with the *Cajun Express* after construction was complete or would be reassigned to one of its sister rigs. Exh. A, at 16.

The *Cajun Express* is now a fifth generation,[1] semisubmersible drilling rig. Exh. A, at 7. It was

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[1] "Fifth generation" refers to the fact that the *Cajun Express* is the most modern drilling rig available with a high level of automation. At the time of Haslam's deposition, there were only ten fifth generation rigs in the world. Exh. A, at 7.

built for the purpose of drilling for oil and gas. Exh. A, at 12. The rig is constructed so that two attached pontoons, which are two hundred feet long, float below the waves and help prevent it from being affected by the motion of the waves.[2] Exh. A, at 7. Using its dynamic positioning system, the *Cajun Express* is capable of deepwater drilling. The system uses four thrusters located on the four sides of the rig to maintain the rig's position over a drill site. [*4]

The *Cajun Express* was constructed in the PPL Shipyard in Singapore. According to Transocean's design engineer Daniel Haslam, "PPL was required to build the rig, install the drilling equipment in its final working position, after which it became Transocean's rig." Exh. A, at 19. PPL was not responsible for commissioning the rig to make sure that it could perform the function of drilling for oil and gas. Exh. A, at 23. During the first half of 2000, the *Cajun Express* underwent sea trials. Exh. A, at 14. The trials confirmed that the vessel's propulsion system worked properly, the vessel was water tight, and the vessel was capable of moving about the oceans under its own power. Exh. A, at 13-14, 20-21.

Following the sea trials, the rig was loaded out to sail over to Gulf of Mexico. When the *Cajun Express* left Singapore, the pontoons, columns, deck box (including the warehouse), drill floor, derrick, thrusters, and all drilling equipment were [*5] in place. Exh. A, at 8-13, 23. At that time, the *Cajun* Express's engines and thrusters were working properly. Exh. A, at 21-22. Although the rig was

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[2] The pontoons apparently do not prevent all motion because Haslam later testified that "the rig moves around due to the waves." Exh. A, at 27.

capable of sailing under its own power, tugboat assistance was used in the voyage to the Gulf of Mexico. Exh. A, at 14; *see also* Doc. # 75, Exhibit C, Deposition of Daniel Haslam in *Hyman v. Transocean Offshore Deepwater Drilling, Inc. ("Hyman")*, Civ. Action No. 03-2959, Eastern District of Louisiana, at 21 (hereinafter "Exh. C, at ___"). During the trip, workers continued to build the rig and commission certain aspects of the rig. Exh. A, at 14.

When the *Cajun Express* arrived in the Gulf of Mexico in August 2000, it was moored off the coast of Grand Isle, Louisiana. Exh. A, at 15, 26. At that time, the *Cajun Express* was capable of drilling for oil and gas under certain limited weather conditions, even though certain pipe handling equipment had not yet been installed. Exh. A, at 27-28; *see also* Exh. A, at 41 (The *Cajun Express* could "perform its intended purpose without [pipe handling equipment, known as riser tailing arms and conductor tailing arms]," but only in "very limited weather conditions that were [*6] not to [Marathon Oil Company's] approval."); *cf.* Doc. # 75, Exh. C, at 17 (stating that the *Cajun Express* was "definitely not" capable of performing its intended function of being a mobile offshore drilling unit on October 30, 2000). After its arrival in the Gulf, the pipe handling equipment, used to move pipe from one location to another, was installed.[3] The vessel's blisters were also installed.

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[3] The Court has relied on two depositions of Daniel Haslam, the design engineer for the *Cajun Express*. Mr. Haslam's deposition was taken in this case on December 6, 2004, and in the *Hyman* case on January 31, 2005. As noted by Judge Lemelle, the Court may properly rely on both depositions because Haslam's testimony was based upon personal knowledge and sets forth

Exh. A, at 15. Blisters are large steel boxes fabricated and welded to the outside of each column to increase a vessel's buoyancy. Additionally, repairs were made to one of the thrusters which had leaked in the trip from Singapore.[4] Exh. A, at 16, 24-25. [*7]

During this time, Cain continued to work as a toolpusher. He was "second in command" behind the senior pusher and was required to "stay up on the drill floor and take care of the drilling activities." Doc. # 75, Exhibit D, Deposition of Rocky Cain, at 14-15 (hereinafter "Exh. D, at ___"). He supervised the drill crew and made sure that all employees under his supervision followed company safety policies. Exh. D, at 15.

On September 10, 2000, Cain was working on the drill floor of the *Cajun Express*. On that date, the blisters were still being installed, and the drilling systems were not yet commissioned. Exh. A, at 17. However, the rig had actually run some pipe. Exh. D, at 34. During his shift, Cain left the drill floor to retrieve a part from the warehouse, which is a room located inside the vessel. The warehouse is approximately [*8] 100 feet long and has aisles with shelving on each side. I-beams cross the ceiling, and light fixtures are immediately adjacent to the I-beams. The light fixtures protrude below the bottom

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admissible facts, and Haslam, who currently resides in Aberdeen, Scotland, will not be made available for trial. *See* Fed. R. Evid. 804(b)(1); *see also Gulf USA Corp. v. Fed. Ins. Co.*, 259 F.3d 1049 (9th Cir. 2001).

[4] In his Order and Reasons, Judge Lemelle has provided a more detailed account of the Cajun Express's activities. While this Court does not believe additional facts are necessary for its analysis, this Court agrees with Judge Lemelle's account of the facts.

of the I-beams. Because the ceilings inside the warehouse are only 5 1/2 feet high, and Cain is 6 feet 4 inches tall, he had to bend over as he walked down the aisle.

While walking in a bent position, Cain struck his head on a light fixture. Cain then experienced dizziness and significant pain in his neck. He was examined by the medic that day. The following day, Cain's neck was extremely stiff, and he had pain in his neck, right shoulder, and arm. Cain worked two more days until his regularly scheduled time off.

When he returned home, Cain was treated by Dr. Michael Hayward, who referred him to a neurosurgeon. The neurosurgeon recommended physical therapy, which Cain underwent.

Cain continued to work during this time.

In the first quarter of 2001, the *Cajun Express* traveled to the Walker Ridge location in the Gulf of Mexico in order to perform a test for Marathon Oil Company, using one of its old wells to demonstrate that the *Cajun Express* was capable of performing vital drilling functions. [*9] Exh. A, at 31-32. The *Cajun Express* successfully completed the test and began drilling operations in April or May 2001 when Marathon Oil Company "accepted the rig." Exh. A, at 29-30.

After the *Cajun Express* began drilling operations, Cain continued to work as a toolpusher until June 20, 2001. Around this time, he sought a second opinion from Dr. Bernie McHugh, a neurosurgeon. Dr. McHugh diagnosed him with a herniated disc and pain. At Dr. McHugh's recommendation, Cain underwent a cervical discectomy and fusion in September 2001.

On December 10, 2001, Dr. McHugh released Cain to return to work as a supervisor. Cain called Transcocean's Houston office to report his release. Three days later, Transocean office personnel told Cain to report to The Fontana Center ("Fontana")[5] in Lafayette, Louisiana, for five days of "work hardening." Cain had been informed that his new assignment was to a drilling barge off the coast of Africa, but that he first had to complete the Fontana program.

[*10] Cain began the work hardening program at Fontana on January 14, 2002. On the second day of the program, Cain experienced elevated blood pressure and pain in his neck, chest, arms, and back. As a result, Fontana discontinued the program and sent him home.

On February 12, 2002, Cain returned to see Dr. McHugh. Cain contends that he received injuries at Fontana that resulted in his having to undergo a second lumbar surgery. Cain's surgery took place on March 30, 2005. During surgery, a blood clot caused Cain to lose 75-80% of the vision in his left eye.

II. LAW AND ANALYSIS

Any seaman who suffers an injury during the course of his employment may bring an action for damages under the Jones Act. 46 U.S.C. § 688. However, any person seeking protection as a seaman under the Jones Act must have an "'employment-related connection to a vessel in navigation.'" *Chandris, Inc. v. Latsis,* 515 U.S. 347, 368, 132 L. Ed. 2d 314, 115 S. Ct. 2172 (1995) (quoting

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[5] Fontana is a third-party defendant in this case, but the allegations against it are not at issue for purposes of this summary judgment.

McDermott Int'l v. Wilander, 498 U.S. 337, 355, 112 L. Ed. 2d 866, 111 S. Ct. 807 (1991)). The Supreme Court has established a two-prong test to determine seaman status. First, "an employee's duties must contribute to the function of the vessel [*11] or to the accomplishment of its mission." *Id.* Second, "a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both duration and nature." *Id.* The seaman status inquiry is a mixed question of law and fact, which is normally reserved for the trier of fact. *See Harbor Tug & Barge Co. v. Papai,* 520 U.S. 548, 554, 137 L. Ed. 2d 800, 117 S. Ct. 1535 (1997); *see also Bouvier v. Krenz,* 702 F.2d 89, 90 (5th Cir. 1983) (citations omitted) (Summary judgment on seaman status is "rarely proper" and even "marginal cases should go to the jury."). The issue of seaman status may be removed from the trier of fact if "the facts and law will reasonably support only one conclusion." *Chandris,* 515 U.S. at 373.

In this case, Transocean argues that, at the time of Cain's injury, the *Cajun Express* was "not equipped, certified or capable of performing the function for which it was intended, to drill for oil and gas," but rather "was still under construction." Doc. # 75, Memorandum in Support of Motion for Summary Judgment, at 2. Therefore, Transocean contends that, because the *Cajun Express* "was not [*12] a vessel in navigation at the time of the alleged September 10, 2000 injury, [Cain] cannot be

considered a Jones Act seaman[,] and Summary Judgment should be granted."[6] *Id.*

In support of these contentions, Transocean cites the Court to the March 11, 2005 ruling by Judge Lemelle in *Hyman*. In that case, the plaintiff was employed aboard the *Cajun Express* as a subsea engineer responsible for building the subsea system on the rig. He was working in this capacity when he was injured on October 25, 2000, over one month after Cain's injury. The *Hyman* defendants moved for summary judgment, claiming that the plaintiff did not have seaman status when he was injured because the *Cajun Express* was under construction, and, thus, was not "in navigation" on that date.[7] In his Order and Reasons, Judge Lemelle conducted a thorough [*13] analysis relying on Fifth Circuit precedent and ultimately concluded that "Hyman was not a seaman for purposes of the Jones Act because the vessel upon which he labored in a construction capacity was not a 'vessel in navigation' as that term is defined under controlling authority." *Hyman*, Order and Reasons, at 7.[8]

In his analysis, Judge Lemelle discusses Fifth Circuit precedent standing for the proposition that a vessel is not "in navigation" and thus an employee cannot show seaman status if the vessel is still under

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[6] Transocean contends that Cain was a ship builder whose injury was covered by the Longshoremen and Harbor Workers' Compensation Act, 33 U.S.C. § 902.

[7] Defendants in Hyman also moved for summary judgment on a retaliatory discharge claim which is irrelevant to the issues before this Court.

[8] While not controlling authority, Judge Lemelle's analysis has been given due deference by this Court.

construction or has not yet begun performing its intended purpose. *See Hyman*, Order and Reasons, at 8 (citing and discussing *Garret v. Dean Shank Drilling Co.*, 799 F.2d 1007, 1009 (5th Cir. 1986), and *Williams v. Avondale Shipyards, Inc.*, 452 F.2d 955, 957 (5th Cir. 1971)). [*14] Judge Lemelle also cited to the decision of a sister district court in *Leonard v. Transocean*, 189 F.Supp.2d 627 (S.D. Tex. 2002), involving very similar facts, in which the court concluded that the rig was not in navigation at the time of the plaintiff's injury.

Immediately prior to Judge Lemelle's decision, however, on February 22, 2005, the Supreme Court issued a decision in *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 160 L. Ed. 2d 932, 125 S. Ct. 1118 (2005), in which the Court considered the definition of "vessel" for purposes of the seaman status test under the Jones Act and for claims under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 902(3)(G). Judge Lemelle did not address the *Stewart* case in his Order and Reasons,[9] and the Fifth Circuit has not yet had the opportunity to address the effect of *Stewart*, if any, on its prior Jones Act decisions.

[*15] In a supplemental brief in opposition to Transocean's Motion for Summary Judgment, Cain argues that, under *Stewart*, there is no requirement that "a vessel had to be fully capable of fulfilling its intended mission before it could be considered a

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[9] Hyman has since filed a motion for reconsideration on the basis of *Stewart*. That motion was denied on August 3, 2005. Judge Lemelle distinguished the *Stewart* case and found that the plaintiff still did not qualify for seaman status because he was employed as a ship builder, not as a Jones Act seaman.

vessel for the purpose of seaman status." Doc. # 84, Plaintiff's Supplemental Brief in Opposition to Transocean's Motion for Summary Judgment, at 2. While not expressly discussing the Fifth Circuit cases on ships undergoing construction, Cain points out that the *Cajun Express* was "clearly a 'watercraft practically capable of maritime transportation,'" and, in fact, "was a brand new, oceangoing vessel that had completed sea trials in Singapore several months earlier" and "had carried men and equipment across the oceans."

Transocean also filed a supplemental brief, again relying on Judge Lemelle's Order and Reasons and further arguing that *Stewart* is irrelevant to the facts in this case. Transocean again contends that the *Cajun Express* was never in navigation **for its intended purpose,** and, therefore, Cain was a ship builder at the time of his injury. Transocean further argues that *Stewart* is irrelevant because that [*16] decision concerns when a vessel "loses its already obtained status of a vessel rather than the time when a vessel under construction becomes a vessel for the first time." Doc. # 86, Defendants' Memorandum of Law, at 15.

Having considered the Supreme Court's decision in *Stewart* and having evaluated its effect on Fifth Circuit precedent, the Court finds that the *Cajun Express* was a vessel in navigation at the time of Cain's alleged injury, and that Cain's claims against Transocean were properly brought under the Jones Act.

First, the Court is cognizant of the fact that the precise issue before the *Stewart* Court was whether a dredge is a "vessel" under the LHWCA. *See* 125 S. Ct. at 1123-24. Nevertheless, the Court was clear

that its analysis is equally applicable to the determination of seaman status under the Jones Act. Accordingly, this Court finds that *Stewart* is relevant to the determination of Plaintiff's seaman status in this matter.

In *Stewart,* the plaintiff was a marine engineer hired by Dutra Construction Company ("Dutra") to maintain the mechanical systems on a dredge called the *Super Scoop.* In a project known as the "Big Dig," [*17] the *Super Scoop* was being used to extend the Massachusetts Turnpike through a tunnel running beneath South Boston and Boston Harbor to Logan Airport. The *Super Scoop* was described as follows:

> The Super Scoop is a massive floating platform from which a clamshell bucket is suspended beneath the water. The bucket removes silt from the ocean floor and dumps the sediment onto one of two scows that float alongside the dredge. The Super Scoop has certain characteristics common to seagoing vessels, such as a captain and crew, navigational lights, ballast tanks, and a crew dining area. But it lacks others. Most conspicuously, the Super Scoop has only limited means of self-propulsion. It is moved long distances by tugboat. (To work on the Big Dig, it was towed from its home base in California through the Panama Canal and up the eastern seaboard to Boston Harbor trench). It navigates short distances by manipulating its anchors and cables. When dredging the Boston Harbor trench, it typically moved in this way once every couple of hours, covering a distance of 30-to-50 feet each time.

Id. at 1121-22.

One of the *Super Scoop's* scows, Scow No. 4, had suffered [*18] an engine malfunction. Stewart was on board Scow No. 4, feeding wires through an open

hatch. *Id.* at 1122. At the same time, the *Super Scoop* was using its bucket to move the scow. *Id.* Unfortunately, the scow collided with the dredge, and the resulting jolt plunged Stewart headfirst through the hatch to the deck below, seriously injuring him. *Id.*

Stewart filed suit against Dutra in federal district court in Massachusetts, alleging negligence under the Jones Act. Alternatively, he made a claim under the LHWCA, which authorizes covered employees to sue a vessel owner as a third party for an injury caused by the owner's negligence. Dutra moved for summary judgment on Stewart's Jones Act claim under First Circuit precedent "which held that 'if a barge . . . or other float's purpose or primary business is *not* navigation or commerce, then workers assigned thereto for its shore enterprise are considered seamen only when it is in actual navigation or transit' at the time of the plaintiff's injury." *Id.* (quoting *DiGiovanni v. Traylor Brothers, Inc.*, 959 F.2d 1119, 1123 (1st Cir. 1992)). Because the *Super* Scoop's primary purpose was dredging [*19] rather than transportation, and it was stationary at the time of the injury, the district court granted Dutra's motion for summary judgment. On interlocutory appeal, the First Circuit affirmed the district court, finding that the *Super* Scoop's primary function was construction, any navigation or transportation was incidental to this function, and the movement of the scow had no effect on Stewart's status as a seaman. *Id.* The First Circuit remanded to the district court for further proceedings.

Dutra then moved for summary judgment on Stewart's claim under the LHWCA. Dutra conceded that the *Super Scoop* was a "vessel" under the First

Circuit's "more inclusive" definition for purposes of the LHWCA. Nevertheless, Dutra argued that it was entitled to summary judgment because any negligence was committed in its capacity as employer, not vessel owner. *Id.* at 1122-23. The district court agreed and granted Dutra's motion for summary judgment. The First Circuit again affirmed.

The Supreme Court granted certiorari "to resolve confusion over how to determine whether a watercraft is a 'vessel' for purposes of the LHWCA." *Id.* at 1123. The LHWCA and [*20] the Jones Act are "complementary regimes that work in tandem: The Jones Act provides tort remedies to sea-based maritime workers [i.e., seamen], while the LHWCA provides workers' compensation to land-based maritime employees." *Id.* The Jones Act is unusual in that the term "seaman" is not defined in the Act itself. Instead, seaman status is guided by "'the maritime law backdrop against which Congress enacted the Jones Act,'" *Id.* at 1123 (quoting *Chandris,* 515 U.S. at 354), and by the LHWCA's exception from coverage of "'a master or member of a crew of any vessel.'" *Id.* (quoting 33 U.S.C. § 902(3)(G)).

In previous decisions, the Supreme Court has addressed the definition of "seaman" in terms of his relationship "to a vessel in order to be a 'master or member' of its crew," but in *Stewart,* the Supreme Court addressed the "other half of the LHWCA's equation: how to determine whether a watercraft is a 'vessel.'" *Id.* at 1124. Because the term "vessel" is not defined in the LHWCA, the Supreme Court turned to the statutory definition Congress did provide: § 3 of the Revised Statutes of 1873 defines "vessel" to

include [*21] "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3. Congress has instructed that this default definition of vessel is to be used "throughout the U.S. Code 'unless the context indicates otherwise.'" 125 S. Ct. at 1124 (quoting 1 U.S.C. § 1). Finding the § 3 definition consistent with the general maritime law, that the definition had been virtually unchanged since 1873, and that the definition was settled at the time Congress enacted the Jones Act and the LHWCA in the 1920's, the Supreme Court unanimously concluded that § 3 provides the "controlling definition" of vessel throughout all sections of the LHWCA. *Id.* at 1124, 1129.

Having held that § 3 provides the definition of vessel, the Supreme Court then reviewed the First Circuit's test for seaman status to determine if it was compatible with that definition. The Supreme Court concluded that "neither prong of the [First Circuit's] test [was] consistent with the text of § 3 or the established meaning of the term 'vessel' under the general maritime law." *Id.* at 1127-28. [*22]

First, the Supreme Court rejected the First Circuit's classification of vessels based on their "primary business." As long as a watercraft is "used, or capable of being used, as a means of transportation on water," the Supreme Court explained that it qualifies as a vessel, whether or not it is used "*primarily* for that purpose." *Id.* at 1128. Second, relying on its previous holding in *Chandris*, 515 U.S. 347, 132 L. Ed. 2d 314, 115 S. Ct. 2172, the Supreme Court explained that "a watercraft need not be in motion to qualify as a vessel under § 3," and that the "in navigation" requirement was not meant

to be interpreted apart from the rest of the definition of § 3. *Id.* at 1128. Accordingly, the Supreme Court held that "under § 3, a 'vessel' is any watercraft practically capable of maritime transportation, **regardless of its primary purpose** or state of transit at a particular moment." *Id.* at 1129 (emphasis added). Because "the *Super Scoop* was engaged in maritime transportation at the time of Stewart's injury, it was a vessel within the meaning of 1 U.S.C. § 3." *Id.*

Applying *Stewart*, this Court concludes that the *Cajun Express* was a [*23] vessel in navigation at the time of Cain's alleged injury. Not only was it capable of being used as a means of transportation on water, but it had provided a means of transportation on water in Singapore when it completed its sea trials and en route from Singapore to the Gulf.

Transocean argues that *Stewart* involved a watercraft that was already a vessel, but had been temporarily taken out of transit for repairs, while this case involves a rig that had never become a vessel at the time of Cain's injury. However, Transocean's argument has been foreclosed by *Stewart*. The Supreme Court stated that it did not intend for the "'in navigation' requirement [to stand] apart from § 3, such that a 'vessel' for § 3 purposes might nevertheless not be a 'vessel in navigation' for purposes of the Jones Act or the LHWCA." *Id.* at 1128. To accept Transocean's argument, the Court would have to conclude that Cain was not a member of the crew of a vessel because the *Cajun Express* was not a vessel in navigation **for its intended purpose** at the time of his injury. While such an argument was valid under the Fifth Circuit's precedent prior to *Stewart*, the Court does not

believe [*24] that the precedent can stand scrutiny under the Supreme Court's analysis.

A review of the two Fifth Circuit cases principally relied upon by Transocean reveals their inconsistencies with *Stewart*. In *Williams v. Avondale Shipyards, Inc.*, 452 F.2d 955 (5th Cir. 1971), the plaintiff was injured during a ship's final sea trials. After additional "construction activities and procedures," the ship was delivered to and accepted by the Coast Guard a month later. *Id.* at 957. Plaintiff brought a Jones Act claim against his employer, the ship builder. The Fifth Circuit concluded that the plaintiff could not prevail on his Jones Act claim because the ship was not a vessel in navigation at that time of his injury, and, therefore, he was not a seaman. The *Williams* Court explained that the vessel must be "in navigation" at the time of the employee's injury. *Id.* at 958. The "term 'in navigation' means 'engaged in an instrument of commerce and transportation on navigable waters.' . . . For a public non-merchant vessel, that would mean engaged in her expected duties as a vessel on navigable waters." *Id.* (citing Norris, LAW OF SEAMEN, § [*25] 664, p. 802; *Carumbo v. Cape Cod, S.S. Co.*, 123 F.2d 991 (1st Cir. 1941); *West v. United States*, 361 U.S. 118, 4 L. Ed. 2d 161, 80 S. Ct. 189 (1959)). The Fifth Circuit concluded that a "ship builder's worker, construction hand or engineer assisting in the building and ultimate commissioning of a launched but uncompleted vessel floating or maneuvering in navigable waters is not a seaman." *Id.* (citation omitted). Stated another way, the Fifth Circuit ruled that "an incompleted vessel not yet delivered by the builder" is not a ship and cannot be

a vessel in navigation; therefore, plaintiff could not establish his status as a seaman.

The Fifth Circuit affirmed and expanded its holding in *Williams* fifteen years later in *Garret v. Dean Shank Drilling Co., Inc.*, 799 F.2d 1007 (5th Cir. 1986). Garret was hired as a roustabout on a barge. *Id.* at 1008. Initial construction was performed in Houma, Louisiana, and the barge (consisting of a hull and flat deck only) was delivered to Harvey, Louisiana. *Id.* There, the barge was moored in a canal and all the remaining structures, fixtures, and appurtenances were added to make it an oil and gas drilling [*26] rig. *Id.* The barge was afloat during this work and was turned two or three times, so that equipment could be placed on it. *Id.* At the time the plaintiff was injured, the hull still lacked crew's quarters, kitchen, derrick, and navigation lights, and it was not completed until two months after the plaintiff's injury. *Id.* The Fifth Circuit first cited Williams's holding and then concluded the Dean Shank barge "was not in navigation **for its intended purpose**" and stated that the "crucial factor in *Williams* was not that the ship had not been delivered to the owner,[10] but that the very activity in which it was engaged, sea trials, showed that it was not in use for its intended purpose." *Id.* at 1009 (emphasis added).

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[10] The plaintiff had argued that his case was distinguishable from an earlier Fifth Circuit decision in *Hollister v. Luke Constr. Co.*, 517 F.2d 920 (5th Cir. 1975). In *Hollister*, the court found that the plaintiff was not a seaman because he was working on a bare-hull barge upon which a drilling rig and living quarters were being constructed, and the barge had not yet been delivered to its owner.

[*27] A close reading of*Stewart* leaves this Court no choice but to conclude that the grafting of the "in navigation for its intended purpose" requirement onto the § 3 definition is in conflict with the Supreme Court's analysis. The Court has examined the Fifth Circuit's vessel test and concludes that it, like the First Circuit test, is inconsistent with *Stewart*. First, the Court notes that the Fifth Circuit has treated "in navigation" as an element of the seaman status test, separate from the vessel test. *See, e.g., Williams,* 452 F.2d at 958. This position was specifically rejected by the *Stewart* court: the Supreme Court did not mean for the "'in navigation' requirement [to stand] apart from § 3, such that a 'vessel' for § 3 purposes might nevertheless not be a 'vessel in navigation' for purposes of the Jones Act or the LHWCA." 125 S. Ct. at 1128.

Second, under the Fifth Circuit's test, a vessel can only be "in navigation" when it is "engaged in an instrument of commerce and transportation on navigable waters." *Williams,* 452 F.2d at 958. Again, the Supreme Court rejected any such requirement that a vessel be "an instrument [*28] of commerce and transportation," but rather limited the courts' inquiry to whether "the watercraft's use 'as a means of transportation on water' is a practical possibility or a theoretical one." 125 S. Ct. at 1128.

Likewise, there is no additional requirement under the Supreme Court test that a "nonmerchant vessel" be "engaged in its expected duties on navigable waters" or "in navigation for its intended purpose" at the time of the employee's injury. *See Williams,* 452 F.2d at 958; *Garret,* 799 F.2d at 1010. While the *Super Scoop* had been dredging prior to plaintiff's injury (i.e., engaged in its expected duties

or in navigation for its intended purpose), the Supreme Court made no distinction as to whether a vessel has or has not begun its "intended" purpose, but relied solely on the § 3 definition and whether a vessel was capable of being used to transport equipment and workers over water.[11] 125 S. Ct. at 1128. There is no doubt that the *Cajun Express* did transport equipment and workers over water well prior to Cain's injury. Thus, the Court concludes that the *Cajun Express* was a vessel in navigation on September 10, 2000. [*29]

However, the Court's inquiry does not end at this point. The Supreme Court has instructed that a plaintiff must still meet the other prerequisites to qualify for seaman status under the Jones Act, providing some limitations to the § 3 definition. *Id.* at 1127. Any worker [*30] injured aboard a vessel must still be a master or member of its crew to be eligible for Jones Act status and must prove that (1) "his duties contributed to the vessel's function or mission," (2) he had a substantial connection in nature to that vessel, and (3) he had a substantial connection in duration to the vessel. *Id.*

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[11] This Court has also considered the analogous Supreme Court case law on vessels undergoing repairs. In that situation, the Supreme Court has instructed that "'the focus should be upon the status of the ship, the pattern of repairs, and the extensive nature of the work contracted to be done.'" *Chandris*, 515 U.S. at 374 (quoting *West v. United States*, 361 U.S. 118, 122, 4 L. Ed. 2d 161, 80 S. Ct. 189 (1959)). Renovations or repairs to a ship that are significant and major may take a ship out of navigation. *Id.* In this case, however, the vast majority of the construction taking place was for the purpose of outfitting the rig with state-of-the-art drilling equipment, and at all times it could still meet the § 3 definition of a vessel.

There is no serious dispute that Cain had a substantial connection to the vessel, both in nature and duration, as he spent all of his work time aboard the *Cajun Express* as a toolpusher, and he was employed on the rig for one year and three months (nine months at the time of his injury). Rather, any dispute would center on the first requirement, whether his duties contributed to the vessel's function or mission.

However, Cain satisfies this first requirement as well. The Supreme Court has previously instructed that satisfying this prong of the seaman status test is relatively easy: the employee need only show that he "does the ship's work." *Chandris,* 515 U.S. at 368. This category is "very broad" and includes "all who work at sea in the service of a ship." *Id.* (internal citations and quotation marks omitted). Here, Cain was never a land-based maritime [*31] worker. At all times during his employment on the *Cajun Express,* he worked as toolpusher, overseeing drilling activities, supervising the drill crew, and ensuring that Transocean's safety policies were followed. Thus, he did the rig's work while on board.

Finally, the Court notes that even if Cain's job title had been identified as "ship builder" or "ship repairman," occupations listed in the LHWA, it would not affect his status as a Jones Act seaman. The Supreme Court has specifically rejected the idea that occupations enumerated in the LHWA restrict an employee's remedies to that statute. *See Chandris,* 515 U.S. at 364 (citing *Southwest Marine, Inc. v. Gizoni,* 502 U.S. 81, 116 L. Ed. 2d 405, 112 S. Ct. 486 (1991)). Rather, it is an employee's "connection to the vessel" that is determinative. *Id.* (citing *Southwest Marine,* 502 U.S. at 89) (other

citations omitted). Even employees "employed by a shipyard and who spend a portion of their time working on shore but spend the rest of their time at sea" may be Jones Act seaman. *Id.* The "Jones Act was intended to protect sea-based maritime workers, who owe their allegiance to a vessel." *Id.* at 376. Cain's connection [*32] to the *Cajun Express* was that of a member of the vessel, and he should be accorded seaman status.

Therefore, the Court finds that the *Cajun Express* was a vessel in navigation at the time of Cain's alleged injury, that Cain had a substantial connection in duration and nature to the rig, and that his duties contributed to the vessel's function or mission. The Court has jurisdiction over Cain's claims under the Jones Act.[12]

III. CONCLUSION

For the foregoing reasons, Transocean's Motion for Summary Judgment [Doc. No. 75] is DENIED.

MONROE, LOUISIANA, this 12th day of August, 2005.

ROBERT G. JAMES
UNITED STATES DISTRICT JUDGE

JUDGMENT

For reasons set forth in this Court's Ruling,

IT IS ORDERED, ADJUDGED, AND DECREED that the Motion [*33] for Summary Judgment [Doc. No. 75] filed by Defendants Transocean Offshore USA Inc. and Sedco Forex Corporation is DENIED.

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[12] Transocean admits that Cain's second alleged injury at Fontana relates back to his initial injury aboard the rig on September 10, 2000, so the Court's conclusion applies to both Cain's initial alleged injury and his second alleged injury.

MONROE, LOUISIANA, this 12th day of August, 2005.

ROBERT G. JAMES
UNITED STATES DISTRICT JUDGE

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Supreme Court, U.S.
FILED
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(3)

No. 08-7

IN THE
SUPREME COURT OF THE UNITED STATES

ROCKY H. CAIN

Petitioner,

v.

TRANSOCEAN OFFSHORE USA, INC.
AND SEDCO FOREX CORP.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fifth Circuit was correct in holding that a vessel under construction and which was not yet approved for its intended purpose, and could not legally perform its intended purpose until millions of dollars of work still needed to be completed, was not a vessel for Jones Act purposes.

2. Whether this Court should accept this case for review when no judge on the original panel and no judge of the entire Fifth Circuit voted for either panel rehearing or rehearing *en banc*.

3. Whether this Court should accept this case for review when the judgment is not final, as there are unresolved issues as noted by the Fifth Circuit in footnote two in its opinion, and considering that Transocean has a Motion for Summary Judgment currently pending before the district court regarding seaman and vessel status under the Jones Act.

4. Whether Petitioner has presented compelling evidence of a square and direct conflict between the circuits, where the Fifth Circuit's opinions in *Hyman v. Transocean Offshore U.S.A., Inc.*, and *Cain v. Transocean Offshore U.S.A., Inc.*, which both held that the CAJUN EXPRESS was not a vessel in navigation at the time of petitioner's injury, do not conflict with principles established by the Eleventh

Circuit in *Mink v. Genmar Industries, Inc.* or *Bunge Corp. v. Freeport Marine Repair, Inc.*, but rather are directly in line with the Eleventh Circuit's earlier decision of *Caruso v. Sterling Yacht and Shipbuilders, Inc.*, which relied on well-established Fifth Circuit precedent in accepting the vessel in navigation requirement for vessel, and hence seaman status.

5. Whether Petitioner has presented compelling reasons for this Court to grant the Petition, where this Court's decision in *Stewart v. Dutra Construction Company* did not overrule or disrupt the longstanding and extensive jurisprudence concerning vessels under construction of the Fifth and Eleventh Circuits.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

I. There is no split between the Eleventh and Fifth Circuit regarding the status of structures that are under construction and not yet vessels.

Despite petitioner's argument to the contrary, Transocean respectfully submits that the Fifth Circuit's long-standing jurisprudence[1] denying vessel status to structures that are not yet complete or have not yet been put into navigation or made an

[1] See petitioner's list of cases from the Fifth Circuit in his Petition for Certiorari.

instrumentality of commerce, is alive and well after this Court's decision of *Stewart v. Dutra Construction Company*[2]. Indeed, in late 2006, the Fifth Circuit was asked to decide, in *Hyman v. Transocean Offshore U.S.A., Inc.*[3], whether the yet unfinished mobile offshore drilling unit CAJUN EXPRESS – the very same structure upon which petitioner worked and who was injured a month and a half before Mr. Hyman – was a vessel. The Fifth Circuit noted that: "Whether an uncompleted craft is a 'vessel in navigation' turns on 'whether the vessel has been placed in navigation for its intended purpose.'"[4] The Fifth Circuit went on to hold that:[5]

> Although [the CAJUN EXPRESS] was partially completed, it lacked certain vital equipment and could not operate as a "mobile offshore drilling unit." The CAJUN EXPRESS was not placed in navigation for its intended purposes until it had been fully constructed and had engaged in the actual drilling operations for which it was built. This did not occur until

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[2] 543 U.S. 481 (2005).

[3] 207 Fed. Appx. 485 (5th Cir. 2006).

[4] *Hyman*, 207 Fed. Appx. at 487.

[5] *Hyman* 207 Fed. Appx. at 487 (emphasis and explanatory commentary added).

> April of 2001, six months after Hyman's initial injury **[and eight months after petitioner's alleged injury in this case].** The CAJUN EXPRESS was thus not a "vessel in navigation" at the time of Hyman's injury.

When asked a second time in *Cain v. Transocean Offshore U.S.A., Inc.*[6] (the case now before this Court), whether the CAJUN EXPRESS was a vessel (this time for an incident involving petitioner that, again, occurred a month and a half before the CAJUN EXPRESS was held not to be a vessel in *Hyman*), the Fifth Circuit again correctly held in the negative, relying squarely on its prior jurisprudence that "an incomplete structure that 'is not yet an instrumentality of commerce'" cannot be a vessel[7], and that "a structure may not attain vessel status before it is ever put into 'navigation'".[8]

It is against this long-standing line of Fifth Circuit precedent that petitioner claims there to be an opposite position in the Eleventh Circuit. In support of his position, petitioner cites *Mink v. Genmar Industries, Inc.*[9], and *Bunge Corporation v.*

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[6] 518 F.3d 295 (5th Cir. 2008).

[7] *Cain* 518 F.3d at 301, citing and quoting *Williams v. Avondale Shipyards, Inc.*, 452 F.2d 955, 958 (5th Cir. 1971).

[8] *Cain*, 518 F.3d at 301.

[9] 29 F.3d 1543 (11th Cir. 1994).

Freeport Marine Repair, Inc.[10]; however, the facts and holdings of these two decisions are highly distinguishable from this case, as they involve already completed vessels or those already in navigation, and do not involve the question of uncompleted vessels or vessel status as it relates to the Jones Act. Most importantly, the Eleventh Circuit, in a similar case has followed the logic of the Fifth Circuit.[11]

In denying a petitioner's petition for certiorari alleging a conflict between circuits, this Court held, in *Miroyan v. U.S.*[12], that the petitioner must allege more than a difference of approach between the circuits, and that a "square or direct conflict" must exist in order to invoke the discretionary powers of review of this Court. It is respectfully submitted that petitioner has failed to satisfy his burden of showing a square or direct conflict between the decisions of the Fifth and Eleventh Circuits.

Moreover, Transocean respectfully submits that there is indeed no difference between the Fifth and Eleventh Circuit's positions, as the Eleventh Circuit, in *Caruso v. Sterling Yacht and Shipbuilders, Inc.*[13], recognized and followed the Fifth Circuit's holdings, a position that has not been

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[10] 240 F.3d 919 (11th Cir. 2001).

[11] Caruso v. Sterling Yacht and Shipbuilders, Inc., 828 F.2d 14 (11th Cir.), reh'g and reh'g en banc denied, 833 F.2d 1021 (11th Cir. 1987).

[12] 439 U.S. 1338 (1978).

[13] 828 F.2d 14 (11th Cir.), reh'g and reh'g en banc denied, 833 F.2d 1021 (11th Cir. 1987).

overruled and remains the law of the Eleventh Circuit to this day.

For instance, in *Mink*, the plaintiff was injured during a pleasure ride on a speed boat in the Gulf of Mexico, and thereafter sued the manufacturer of the pleasure craft for products liability under state law. The Eleventh Circuit was faced with determining whether Florida state law or substantive maritime law applied to the plaintiff's claims for his injuries, as well as his products liability claim. The court held that admiralty jurisdiction applied to all claims, and ultimately that the plaintiff's claims were time barred by the three year maritime statute of limitations.

In dicta contained solely within a footnote, the Eleventh Circuit rejected the plaintiff's argument that the incident did not satisfy the situs requirement of the test for admiralty jurisdiction because the pleasure craft was not a completed vessel, and as such not "in navigation" for purposes of determining whether admiralty jurisdiction applied. In rejecting this contention, the court declined to apply the Fifth Circuit's decision in *Reynolds v. Ingalls Shipbuilding Div., Litton Systems, Inc.*[14], which held that vessels undergoing sea trials are not vessels in navigation for purposes of the Jones Act. The Eleventh Circuit discussed *Reynolds*, stating that it had no application because "no case located suggests that the 'completed vessel' analysis is appropriate to the facts of this case."[15] In

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[14] 788 F. 2d 264 (5th Cir.), cert. denied, 107 S.Ct. 278 (1986).
[15] *Mink*, 29 F. 3d at 1545, n. 3.

other words, the Fifth Circuit's jurisprudence had no place in the Eleventh Circuit's analysis in *Mink* because there was a working vessel (a functioning speed boat used in navigation and made an instrumentality of commerce) involved in the accident. The Eleventh Circuit merely declined to apply the "complete vessel" analysis to the facts; the court neither rejected the Fifth Circuit's analysis in substance nor held that it would not apply in other contexts.

Here, the difference is clear: petitioner was allegedly injured on board a structure that was intended to be used for offshore drilling, the CAJUN EXPRESS, and it was still under construction at the time of petitioner's alleged injury. Put simply, the CAJUN EXPRESS had not become a vessel because it had yet to be completed and could not undertake its intended purpose as a semi-submersible mobile offshore drilling unit. In contrast, the pleasure craft at issue in *Mink* was fully operational and was being used for its intended purpose and as an instrumentality of commerce at the time of the plaintiff's injury.

With regards to *Bunge*, that case involved a suit for recovery of damages sustained as a result of the defendant's vessel, Hull No. 40, coming unmoored and subsequently striking a grain-loading facility owned by the plaintiff during a hurricane. The central issue involved whether the *Louisiana* Rule applied to the plaintiff's claims shifting the

burden of proof onto the defendant.[16] The defendant argued that its Hull No. 40 was not a vessel, as it was not complete, and thus admiralty jurisdiction and the *Louisiana* Rule did not apply.

The Eleventh Circuit held that the district court had admiralty jurisdiction, *i.e.*, the status and situs test, and that the "incident bore a substantial relationship to traditional maritime activity."[17] The court held that because the "allision occurred in navigable waters due to the imperfect mooring of a nearly complete vessel," the incident satisfied the situs requirement of the nexus test, thus conferring admiralty jurisdiction.

Similar to *Mink*, the *Bunge* decision cited by petitioner does not create a square or direct conflict with the Fifth Circuit's jurisprudence concerning when a structure under construction becomes a vessel. Unlike the plaintiff in *Bunge*, petitioner has alleged personal injuries under the Jones Act, not property damages or the implication of the *Louisiana* Rule or whether admiralty jurisdiction (at least from a status and situs perspective) applies. The Fifth Circuit in this case determined that the CAJUN EXPRESS did not constitute a vessel in navigation for the purposes of Jones Act seaman

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[16] The *Louisiana* Rule provides that "when a moving ship strikes and damages a stationary object, it is presumed that the moving ship is at fault." *Bunge*, 240 F. 3d at 923 citing *The Louisiana*, 70 (3 Wall.) U.S. 164, 173 (1866). This rule is also known as the *Oregon* Rule.

[17] *Bunge*, 240 F. 3d at 925.

status, not for the purposes of determining overall application of admiralty jurisdiction as in *Bunge*.

Setting *Mink* and *Bunge* aside, the fallacy of petitioner's circuit split argument is evidenced by the Eleventh Circuit's decision in *Caruso v. Sterling Yacht and Shipbuilders, Inc.*[18], in which the court held that a vessel under construction was not a "vessel in navigation". There, plaintiff, a cook hired to work aboard a newly constructed vessel, was injured aboard the structure while it was still being completed. The structure was not licensed at the time of plaintiff's injury, and it had not been put into commerce.

The Eleventh Circuit, in examining the vessel status issue, stated: "Our decision is predicated solely on the 'in navigation' requirement. To be 'in navigation,' a vessel must be 'engaged as an instrument of commerce and transportation on navigable waters.'"[19] In reaching its holding that the structure at issue was not a vessel, and hence the plaintiff was not a seaman, the Eleventh Circuit relied on no less than four cases from the Fifth Circuit[20] in support of its holding. The court also relied on cases from the Fourth Circuit to again point out that uncompleted vessels are not a part of

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[18] 828 F.2d 14 (11th Cir.), reh'g and reh'g en banc denied, 833 F.2d 1021 (11th Cir. 1987).

[19] *Caruso*, 828 F.2d at 15.

[20] *Williams v. Avondale Shipyards, Inc.*, 452 F.2d 955 (5th Cir. 1971); *Reynolds v. Ingalls Shipbuilding Division, Litton Systems, Inc.*, 788 F.2d 264 (5th Cir.), cert. denied, 107 S.Ct. 278 (1986); *Bouvier v. Krenz*, 702 F.2d 89 (5th Cir. 1983); and *Burns v. Anchor-Wate Co.*, 469 F.2d 730 (5th Cir. 1972).

commerce or navigation, two essential prerequisites for vessel status under the Fifth Circuit's jurisprudence.[21]

The *Caruso* decision is still the law of the Eleventh Circuit, and its holding is in no way challenged, distinguished or even commented upon by either the *Mink* or *Bunge* decisions.

In sum, petitioner has failed to establish a square or direct conflict between the decisions of the Fifth and Eleventh Circuits when it comes to the status of vessels under construction particularly in relation to Jones Act seaman status.[22] Accordingly, there is no reason for this Court to grant petitioner's request for review based on a split amongst the circuits. It should also be noted that no member of the original *Cain* panel, let alone any other judge within the entire Fifth Circuit, voted for either panel rehearing or rehearing *en banc*, evidencing no split amongst the judges within the Fifth Circuit itself. For both these reasons, the Petition for Certiorari should be denied.

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[21] *Caruso*, 828 F.2d at 16.

[22] Petitioner cites in a footnote the decision of *Crawford v. Electric Boat Corporation*, 515 F. Supp.2d 282 (D.Conn. 2007), as further support, however, the court in *Crawford* found that vessel status was implicated by the plaintiff himself because he alleged causes of action under the Public Vessels Act and the Suits in Admiralty Act, both of which the court noted require an initial finding, or at least an allegation, of vessel status, thereby negating the plaintiff's claim that he had no connection to a vessel in navigation.

II. *Stewart* did not upset or overrule the extensive jurisprudence concerning the construction of vessels recognized by the Fifth and Eleventh Circuits.

As argued previously, the jurisprudence of the Fifth Circuit concerning non-completed vessels has not been challenged by the Eleventh Circuit, and indeed remains on solid footing in the wake of *Stewart*.

First, *Stewart* dealt with an already completed structure (a dredge) that was being used for its intended purpose and was acting as an instrumentality of commerce. Indeed, the structure (later held to be a vessel) involved in *Stewart* had been a necessary participant in certain activities, moving from various locations to another to engage in its intended purpose as a dredge. *Stewart* did not address the issue of whether an incomplete structure not capable of performing its intended duties can be a vessel for Jones Act purposes.

Second, this Court in *Stewart* recognized that some structures once considered vessels can lose their vessel status if they have been withdrawn from the water (and hence navigation) for extended periods of time.[23] By the same logic, it stands to reason that, in order for a structure to lose its status as a vessel, it must first be considered a vessel, *i.e.*, it was actively engaged in its intended purpose and was subsequently withdrawn from that purpose.

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[23] *Stewart*, 543 U.S. at 496 (internal citations omitted).

That scenario never happened with the CAJUN EXPRESS: it never before had engaged in offshore drilling operations; and, as the record below reflects, and which petitioner admits, it could not perform the designed operations for which it was intended at the time of petitioner's alleged injury.

Finally, petitioner's argument that the CAJUN EXPRESS as of April 2001 (after petitioner's alleged injury) was capable of performing its intended purpose is of no moment when analyzing the status of the CAJUN EXPRESS at the time of petitioner's alleged injury. Petitioner was assigned to work aboard the CAJUN EXPRESS while it was still being built, a position petitioner admits he held for a significant period of time before April of 2001.

This Court in *Chandris, Inc. v. Latsis*[24], held that a change in a worker's duties or assignment must be contemplated when determining seaman status, both for the benefit of and detriment to a worker and employer:

> For example, we can imagine situations in which someone who had worked for years in an employer's shoreside headquarters is then reassigned to a ship in a classic seaman's job that involves a regular and

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[24] 515 U.S. 347 (1995)

> continuous, rather than intermittent, commitment of the worker's labor to the function of a vessel. Such a person should not be denied seaman status if injured shortly after the reassignment, just as someone actually transferred to a desk job in the company's office and injured in the hallway should not be entitled to claim seaman status on the basis of prior service at sea. If a maritime employee receives a new work assignment in which his essential duties are changed, he is entitled to have the assessment of the substantiality of his vessel-related work made on the basis of his activities in his new position.[25]

The law is clear that any future work contemplated, whether by the employer or the plaintiff, is not to be considered when determining seaman status. As this Court later stated in *Harbor Tug and Barge Company v. Papai*[26], wherein it

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[25] *Chandris*, 515 U.S. at 372 (emphasis added).

[26] 520 U.S. 548, 556 (1997).

declined to predict seaman status under the Jones Act based on the possible seagoing yet sporadic nature of some of the duties plaintiff could have been hired to perform in the future, that where an employee is injured during a new work assignment, the employee's prior work history should not be considered when determining seaman status: "[T]he employee's prior work history with a particular employer may not affect the seaman inquiry if the employee was injured on a new assignment with the same employer."[27]

Here, the same result should follow: at the time of petitioner's alleged accident, his work assignment had changed from his previous employment as he was not working aboard a completed vessel "in navigation." Whether petitioner worked on the CAJUN EXPRESS after it was completed and put into commerce, or he was

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[27] See also *West v. Lamulle Construction Company, Inc.*, 1998 WL 151428, * 6 (E.D. La. 1998 J. Clement) (same, and citing *Papai*); *Sikorski v. Halliburton Energy Services, Inc.*, 2005 WL 1574443, * 3 (E.D. La. 2005 J. Lemmon) (employee cannot be "deemed a seaman because of his contemplated future work on that vessel."); *Nicole v. Southstar Industrial Contractors*, 2004 WL 936848, * 2 (E.D. La. 2004 J. Zainey) (future assignments from both the employee's and employer's perspective are entirely speculative; plaintiff "cannot rely upon mere future possibilities to create seaman status in the present."); *Smith v. Nicklos Drilling Company*, 841 F.2d 598 (5th Cir. 1988) ("The employee must be a seaman at the time his claim arises; the fact that he was once a seaman and that either he or his employer intends someday for him to again become one do not suffice to tint with blue water status all the events that happened in between, however remote in time and place from a vessel past or a vessel future.")

promised future work aboard it or some other vessel, has no bearing on his or the structure's status at the time of his alleged accident.

CONCLUSION

There is no square and direct conflict between the Fifth and Eleventh Circuit regarding the non-vessel status of structures still under construction and which have not been made an instrumentality of commerce and otherwise placed "in navigation." This Court's decision in *Stewart* did nothing to undermine the Fifth Circuit's long-standing line of jurisprudence regarding vessels still being constructed, as *Stewart* involved a completed vessel that clearly was being used in commerce for its intended purpose at the time of the accident.

For the foregoing reasons, Petitioner's Petition for Certiorari should be denied.

Respectfully submitted,

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(2)

No. 08-7

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In the Supreme Court of the United States

ROCKY H. CAIN,

Petitioner,

v.

TRANSOCEAN OFFSHORE USA, INC., AND SEDCO FOREX CORP.

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF

I.
CARUSO, THE MAIN CASE RELIED UPON BY DEFENDANT, IS DISTINGUISHABLE FROM THE PRESENT CASE

In its opposition, Transocean relies mainly on *Caruso v. Sterling Yacht and Shipbuilders,*[1] decided by the Eleventh Circuit prior to *Stewart,*[2] to demonstrate that there is no conflict between the Eleventh and the Fifth Circuits.

However, the facts in *Caruso* are completely distinguishable from the facts of the present case. The plaintiff in *Caruso* had been hired to work on an uncompleted vessel, which had not yet been tested for sea trials and was injured while quartered ashore in a hotel. Here, Cain was injured on a vessel, the CAJUN EXPRESS, which had been completed, undergone sea trial, and had been accepted by its owner, Transocean Offshore USA, Inc. The CAJUN EXPRESS was cabable of and used for transportation on navigable water.

II.
THE COMBINATION OF THE TWO DECISIONS OF THIS COURT, *TUCKER* AND *STEWART*, UPSET AND OVERRULE THE JURISPRUDENCE OF THE FIFTH CIRCUIT

In the decision below, the Fifth Circuit correctly

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[1] *Caruso v. Sterling Yacht and Shipbuilders, Inc.*, 828 F.2d 14 (11th Cir. 1987), reh'g and reh'g en banc denied, 833 F.2d 1021 (11th Cir. 1987).

[2] *Stewart v. Dutra Construction Co.*, 543 U.S. 481; 125 S. Ct. 1118; 160 L. Ed.2d 932 (2005).

stated that the language in *Stewart* is broad and significantly enlarges the types of unconventional and special purpose watercraft to be considered vessels (*i.e.* every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water). But it failed to specifically consider whether, after *Stewart,* an incomplete structure which is capable of and actually used for transportation in navigable water is or can be a "vessel in navigation." Instead it merely applied its own pre-*Stewart* jurisprudence to hold that the CAJUM EXPRESS was not a vessel.

However, this Court has already ruled on this issue in *Tucker v. Alexandroff*[3] in a manner which is consistent with the reasoning in *Stewart.*

In *Tucker,* defendant, Alexandroff, a Russian naval service conscript, was sent, along with an officer and other men, to take possession of and man the Variag, then under construction in Philadelphia. The Variag was still upon the stocks when the men arrived in Philadelphia. She was, however, launched at the time Alexandroff deserted. When Alexandroff left without leave, the Variag was lying in the stream, still under construction, not yet having been accepted by the Russian government. After he deserted, Alexandroff was subsequently arrested upon the written request of the Russian vice-consul and was committed upon a mittimus stating that he had been charged with desertion from the Imperial Russian crusier Variag, upon the complaint of the captain, in accordance with the terms of the treaty between the United States and Russia. The district

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[3] *Tucker v. Alexandroff,* 183 U.S. 424; 22 S. Ct. 195; 46 L.Ed.264; 1902 U.S. LEXIS 724 (1901).

court and court of appeals agreed that neither under the terms of treaty of 1832 with Russia nor pursuant to the principles of international comity could Alexandroff be delivered over to the master of the Variag as a deserter.

The ninth article of the 1832 treaty authorizes the arrest and surrender of "deserters from the ships of war and merchant vessel of their country." Thus, this Court had to decide whether the Variag was a ship.

As explained by Mr. Justice Gray in his dissenting opinion:

> Alexandroff entered the Russian Navy in 1896, at the age of seventeen, for the term of six years, and was an assistant physician. He was one of fifty-three members of the Russian Navy, sent out in passenger steamship (not a Russian) by the Russian Government, under command of an officer, for the purpose of becoming part of the crew of the cruiser Variag; and arrived in this country October 14, 1899. The ship was then on the stocks, and was launched in October or November, 1899, and made one trial trip. But in June, 1900, she was still in the custody of the contractors, had not been completed by them, or accepted by the Russian government, and a good many of the contractors' men were still working on her; and only about eighty per cent of her price had been paid. Alexandroff was never on the ship, never signed any paper as a member of her crew, and was never ordered on board of her, either as a seaman or as an assistant physician; but from October, 1899, to April, 1900, lived on shore, with the rest of the men who came with him, had his photograph taken with them, received equipment, support and wages from the Russian Government, and performed the duties required of him as an assistant physician. He left his

> associates, without leave, at Philadelphia on April 20, 1900, went to New York, and there took up his residence, and on May 24, 1900, made in court a primary declaration of his intention to become a citizen of the United States[4].

However, even if the Variag had not yet been accepted by the Russian Government, had made one trial trip only, and Alexandroff had never set foot upon the vessel, a majority of this Court had no choice but to find that the Variag was a vessel:

> At the time Alexandroff arrived in Philadelphia, the Variag was still upon the stocks. Whatever be the proper construction of the word under the treaty, she was not then a ship in the ordinary sense of the term, but shortly thereafter and long before Alexandroff deserted, she was launched, and thereby became a ship in its legal sense. A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron – an ordinary piece of personal property – as distinctly a land structure and a house, and subject only to mechanics' liens created by state law and enforceable in the state courts. In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction. She acquires a personality of her own, becomes competent to contract, and is individually liable for her obligations, upon which she may sue in the name of her owner, and be sued in her own

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[4] *Tucker v. Alexandroff*, 183 U.S. 424, at 453.

> name. [...] She is capable, too, of committing a tort and is responsible of damages therefor.
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> [...] So sharply is the line drawn between a vessel upon the stocks and a vessel in the water, that the former can never be made liable in admiralty, either in rem against herself or personam against her owners, upon contracts or torts, while if, in taking the water during the process of launching, she escapes from the control of those about her, shoots across the stream and injuries another vessel, she is liable to a suit in rem for damages[5].

Reading *Stewart* in the light of *Tucker* permits no conclusion other than that a vessel in navigation is any watercraft practically capable of maritime transportation, from the moment it is launched and touches water until it is permanently withdrawn from the water. The CAJUN EXPRESS was launched and actually capable of maritime transportation. Certainly, it was capable of and used for transportation in a much more sophisticated capacity than the scow in *Stewart.*

These two decisions complement each other. Following the reasoning of these two cases, the CAJUN EXPRESS should have been found to be a vessel in navigation inasmuch as it was launched, had transported workers and equipment from Singapore to the Gulf of Mexico, and was in navigation in the Gulf of Mexico on the date of the accident.

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[5] *Tucker v. Alexandroff*, 183 U.S. 424, at 437-440.

II.
THE ELEVENTH CIRCUIT'S DECISION IN *BUNGE*, CITING *TUCKER*, IS CONSISTENT WITH *STEWART* AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FIFTH CIRCUIT IN *CAIN*

In *Bunge Corp. v. Freeport Marine Repair, Inc.*, 240 F.3d 919, 922-925 (11th Cir. 2001), the Eleventh Circuit rejected the use of a definition other than 1 U.S.C. § 3, just as this Court did in *Stewart*, and relied on *Tucker* in deciding that the watercraft in that case was a vessel:

> Although a pre-nexus case, the Supreme Court in *Tucker v. Alexandroff*, 183 U.S. 424, 438-39, 46 L. Ed. 264, 22 S. Ct. 195 (1901), addressed whether a vessel under construction may be subject to admiralty jurisdiction. In essence, the Court held that a vessel in its stocks could not be made liable in admiralty, either *in rem* or *in personam*. The Court did state, however, that "in the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction." *Id.* at 438, 22 S. Ct. 195. Like the vessel in *Tucker*, Hull No. 40 was launched and floating in a navigable water way.

Each of these decisions, from this Court and from the Eleventh Circuit, conflicts directly with that of the Fifth Circuit in *Cain v. Transocean Offshore USA, Inc.*[6]

CONCLUSION

There is a square and direct conflict between the

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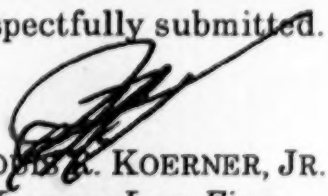
[6] *Cain v. Transocean Offshore USA, Inc.*, 518 F.3d 295 (5th Cir. 2008).

Fifth and Eleventh Circuits regarding the vessel status of under construction but in navigation structures. In the present case, the CAJUN EXPRESS was not only in navigation, but finished, accepted by its owner, Transocean Offshore USA, Inc., had transported workers and equipment from Singapore to the Gulf of Mexico, and was in navigation in the Gulf of Mexico.

This Court's decisions in both *Tucker* and *Stewart* overruled the Fifth Circuit's prior jurisprudence regarding vessels still being constructed.

Finally, Cain should not be removed from Jones Act coverage while he was being exposed to the rigors and perils of the sea just because the newly-completed vessel capable of transportation on which he had been injured had not yet been accepted by the customer, Marathon Oil, as this is irrelevant.

Respectfully submitted.



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